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THE LAW OF INSANITY

BY

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KANSAS CITY, MO.

VERNON LAW BOOK COMPANY

1929

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Dedicated
to the Memory of
JUDGE JOHN C. TOWNES
Formerly Dean of Law
University of Texas

PREFACE

THE writing of this book has been brought about largely by necessity. Finding no recent work on the subject, from time to time in the course of twenty years' practice, the author has been obliged to make independent investigations of the authorities. These investigations awakened an interest which led to fuller study. Doubtless other members of the profession are meeting with like necessity for research, especially in view of the increasing complexities in the law relating to this class of persons and the administration of their estates. This work is offered, therefore, with the sincere desire to be of service to the profession in meeting a real need.

Acknowledgment is made to many members of the profession for the valuable aid which they have rendered, both in furnishing briefs containing the results of their own investigations, and in making suggestions.

GEORGE A. SMOOT.

February 27, 1929.

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IN
LAW AND PRACTICE

PART 1

STATUS OF NON COMPOS AS AN INDIVIDUAL

CHAPTER 1

PRELIMINARY STATEMENT

§ 1. Introduction

Man is the servant of his mind. It is the pilot of his being, that stirs and directs his course upon life's ocean. His every act is in answer to its dictates, and without it he is but a stranded hulk, without course or direction, drifting as the winds of chance may impel. Strike down the pilot, or enfeeble the hand upon the tiller, and he ceases to be an argosy bound for a definite port, and becomes a derelict, aimlessly drifting in the Sargasso Sea of existence.

Law is made for rational beings. It is based upon the inherent sense of right which the Creator has given as an inseparable part of Reason. When the spark of reason has been quenched in the human body, with it dies responsibility before the law, and what is left is an irresponsible charge upon society.

CHAPTER 2

HISTORY OF INSANITY

Sec.
2. Its place in history—In general.
3. In early history.
4. Among primitive people.
5. Among ancient nations.
6. Status in early society.
7. In medieval and modern history.
8. Final recognition.
9. Bases of American law.

§ 2. Its place in history—In general

Insanity and the necessary care of the insane has been one of society's problems from the earliest times. It must have been as large a problem to the family before it merged into society in its larger sense. When the unfortunate being without reason was born into the family circle, its other members had to take some course of action with reference to the new member.

§ 3. In early history

Various were the attempts of the early nations to solve the problem thus presented to them, and it is noticeable fact that the methods adopted by nations in their attempt to solve this problem have usually marked their rise or fall in the scale of civilization.

§ 4. Among primitive people

The primitive nations seem to have solved the problem in the, to them, most expedient way, by driving the unfortunates out into the wilds to shift for themselves, and where they either died from want, fell a prey to wild beasts, or reverted to a condition little above the beasts themselves, and frequently became a terror to the people living in the vicinity. Even kings and princes were subject to this custom, as is shown by the familiar case of King Nebuchadnezzar, king of Babylon in the sixth cen-

tury B. C., who was driven from his palace into the fields after losing his reason, and fed with the cattle.[1] As late as the time of Christ, the insane were found living in caves and abandoned tombs and were often a scourge to the neighborhood.[2]

§ 5. Among ancient nations

In yet other places, these unfortunates were regarded by the populace as being possessed of evil spirits, or as being the dwelling place of devils, who were responsible for such irrational conduct. In Egypt and some other eastern countries, the insane were considered as having been afflicted by the gods, and were piously avoided as things accursed. In the Near East they have always been regarded as divinely inspired beings, and only recently has any serious attempt been made to restrain even dangerous lunatics wandering at large.[3] While, in the early centuries of the Christian era, physicians associated madness with disease of the brain, yet this progress in knowledge was lost in the ignorance and superstition of the Middle Ages which followed,[4] and in the tenth century many of these unfortunates were actually executed as witches and dealers in the black arts, and horrible tortures were employed to drive out the devils which were supposed to possess them. The pitiable condition of the insane is one of the most touching and terrible pictures of this period.

§ 6. Status in early society

The lunatic and idiot occupied no definite position in society at this time. His very existence was recognized only to the extent of an unavoidable evil. He had no place in the scheme of society, as he was in no way necessary to its ends, and society had not yet developed a sense of responsibility for those not necessary to its selfish ends. Upon the revival of learning in

1 Daniel 4:33.

2 Mark 5:2–5; Luke 8:27–29.

3 Witthaus & Becker's Med. Jur. vol. 3, p. 173; New International Enc. (2d Ed.) vol. 12, p. 200; Inter. Standard Bible Enc. vol. 3, p. 1961.

4 Enc. Brit. (9th Ed.) tit. "Insane."

the latter part of the fifteenth century, when the educated began to find interest in early literature, the opinions of physicians found in works of earlier times were studied; and the medical profession began to once more recognize that the loss of reason was the result of mental disease, and reviving science began to look through the veil of aversion and superstition at the true and pitiable condition of these outcasts from society.

§ 7. In medieval and modern history

As early as the twelfth century, pious monks in various parts of Europe had established rude asylums for the shelter of the insane, usually as the part of some monastery,[5] and upon the rise of the towns in the fourteenth century the care of the insane within their walls was taken over or contributed to by the civil authorities. In many cases asylums and refuges were erected for their shelter, and later, for their treatment as well. About 1539 the city of London took over and established an asylum for a limited number of the insane. The name of Bedlam, derived likely from the name of Bethlehem, was given to it, and has come down to us as a synonym for mad house or asylum. Later similar institutions were established at other points in Europe, e. g., the Paris Hospital.[6] The earliest institution in America seems to have been one established in Massachusetts in 1676, and one was established in Pennsylvania by the Society of Friends in 1709.[7]

Thus it was that society, under the impulse of advancing civilization, came gradually to recognize its duty to this unfortunate class, and the foundation was laid for the present extensive system of public asylums and for the more or less elaborate system of rules for the care and custody of the insane.

5 Enc. Brit. (9th Ed.) tit. "Insane."
6 6 Chambers' Enc. 218.
7 15 Am. Enc. 148.

§ 8. Final recognition

As a necessary result of the provision made for their care and treatment, lunatics and idiots were soon recognized as members of society, with certain of its rights, notwithstanding their irrational condition. At the same time, their mental condition made it necessary to place restrictions upon the rights accorded to, and liabilities imposed upon, them as members of society. As a result, a set of rules, peculiar to their class, has been evolved as governing their civil rights and criminal responsibilities, and this has become a part of the jurisprudence of every civilized nation.

§ 9. Bases of American law

The principles of law governing the rights and responsibilities of the insane, in the state and federal courts of the American Union, are almost entirely an outgrowth of the English common law, supplemented by local codes and statutes. While there are decided conflicts between some of these courts as to some important principles, there is an astonishing uniformity in the main. Therefore we think that the composite system reflected in a majority of the decisions of these courts may be presented with confidence as the controlling law on the subject in this country.

CHAPTER 3

DEFINITION OF INSANITY

Sec.
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11. Required extent of derangement.
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13. Time of derangement.
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20. Association of ideas.
21. As test of derangement.
22. Inflamed mind, or mania.
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§ 10. General nature of insanity

Insanity, or non compos mentis, is a broad term, covering all the disorders of the mind that affect men in their relations to one another.[1] It appears in forms without number, and shades off from conditions where there is a total absence of reason to conditions where the derangement is so slight as to be little more than a mere idiosyncrasy. Indeed, insanity and mere peculiarity of temperament shade into one another so nicely that it might puzzle the most learned to tell just where one leaves off and the other begins; who is insane, and who is not. As has been said, with much truth as well as humor, "All the world art queer, but thee and me, and thou art queer sometimes."

[1] Bouv. Law Dict. tit. "Insanity"; Words and Phrases, vol. 4, First Series, p. 3636.

§ 11. Required extent of derangement

If the test of absolute mental equipoise was applied, few men would be deemed sane, much in the same manner as few men measure up to the standard of physically perfect manhood. Yet not all of the men who fall short of such physical perfection are, in consequence, looked upon as deformed. All that it is required for a man to be considered normal is that the body be sufficiently developed to perform its functions. Limbs may be too long or too short, thin or bowed; yet the person is not a cripple, if he can walk in a normal manner. Similarly, the law will only take into account those mental disorders which so distort the reason as to prevent the mind from performing its regular functions.

§ 12. Range of mental affection

Again, the mind may be deranged only as to one or more subjects. It is a matter of frequent observation that persons are sometimes "cranks" along certain lines, and are at the same time very shrewd business men. If this "peculiarness" amounts to such a derangement as to incapacitate the mind to perform its regular functions along the lines of such peculiarity, the person is of course insane in that particular.

§ 13. Time of derangement

Yet again, the mind may be deranged only at times, and normal, or apparently normal, at others. This may be at frequent and regular intervals, or it may be after long lapses of time, and after it appears that the patient has entirely recovered. Manifestly, during one of these periods of derangement, the mind has ceased to perform its normal functions, and only takes up its duties on its recovery from the attack.

§ 14. Definition—In general

It will be evident, from these widely varied forms in which it appears, that it is exceedingly difficult to give a clear-cut definition of insanity, which will cover all the phases of the subject.

Yet it is so important to have some definite rule, by which to determine just what degree and kind of mental derangement will amount to legal insanity, that the courts from early times have attempted it, and the reports and encyclopedias are full of suggested definitions. In order to determine some of the recognized elements of the required definition, a few of these may be noticed.

§ 15. Definitions given in authorities

Coke defined an insane person as "he that by sickness, grief or other accident wholly loseth his reason." [2] Chancellor Hardwicke, in Ex parte Barnsley, says: "Being non compos * * * imports a total deprivation of sense." [3] Mr. Bouvier, in his Dictionary, states: "Legal insanity is * * * a mental deficiency with reference to the particular act in question, and not a general deficiency." [4] The Chancery Court of Delaware aptly says: "It does not mean a total deprivation of reason, but only an inability, from defect of perception, memory, and judgment, to do the act in question." [5] Mr. Buswell, in Cyc., uses the following language: "Insanity has been judicially defined to be such a derangement of the mental faculties that the individual has lost the power of reasoning correctly." [6]

§ 16. Elements of correct definition

From these and other authorities that might be cited, it would seem that the courts and text-writers generally recognize that these conditions must exist to produce legal insanity, viz.:

[2] Coke Litt. § 247a.
[3] Ex parte Barnsley, 3 Atk. 172.
[4] 1 Bouv. Law Dict. p. 1589.
[5] Frazer v. Frazer, 2 Del. Ch. 260.
[6] Waters v. Connecticut Mut. Life Ins. Co., 2 F. 892.

(a) Mental disorder

There must be a disorder of the mental faculties, resulting either from disease, external injury, severe mental strain,[7] or other causes. No mere weakness of the will, nervousness, inebriety, or moral perversion will answer, unless it can be traced to the seat of reason.[8]

(b) Subversion of reason

The mental disorder must be such as to deprive the person affected of moral freedom of action, and weaken or destroy the governing powers of the mind over the actions. Man, being a free moral agent, is bound by his choice of action, however weak his will may be as opposed to the impulse to act, provided he has the opportunity of choice. Where the mind is diseased to a sufficient extent, he has not such power of choice, but his physical being must follow where the vagaries of the diseased mind lead.[9]

(c) Coexistence with transaction

It must exist at the time of the transaction in question, and with respect to the matter sought to be avoided.[10] It is well rec-

[7] Rather v. State, 25 Tex. App. 623, 9 S. W. 69; Blackstone v. Standard Life & Acc. Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; Haile's Curator v. Texas & P. R. Co., 60 F. 557, 23 L. R. A. 774; Waters v. Connecticut Mut. Life Ins. Co., 2 F. 892; Connecticut Mut. L. Ins. Co. v. Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. Ed. 536.

[8] Cannon v. State, 41 Tex. Cr. R. 467, 56 S. W. 360; Graves v. State, 45 N. J. Law, 347, 46 Am. Rep. 778; Hawe v. State, 11 Neb. 537, 10 N. W. 452, 38 Am. Rep. 375; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651; Waters v. Connecticut Mut. Life Ins. Co., 2 F. 892; In re Forman's Will, 54 Barb. (N. Y.) 274, 291.

[9] Riley v. State (Tex. Cr. App.) 44 S. W. 498; Davis v. U. S., 165 U. S. 373, 17 S. Ct. 360, 41 L. Ed. 750; Com. v. Mosler, 4 Pa. 264; McCarty v. Commonwealth, 114 Ky. 620, 71 S. W. 656; Wilcox v. State, 94 Tenn. 106, 28 S. W. 312; Beck, Med. Jur. 761.

[10] Thomas v. State, 55 Tex. Cr. R. 293, 116 S. W. 603; Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St.

ognized that insanity is, at times, transient in its effect, and may only occur for brief intervals. Such person may ordinarily be perfectly sane, and so remain until one of the attacks come upon him. On the other hand, an insane person may have brief lucid intervals, as we shall see hereafter. It will therefore be seen that only when the insanity acts on the mind at the time of the transaction can it be taken into account in measuring the responsibility of the individual.[11]

§ 17. Phenomena of mind

As insanity is a mental disease, finding its seat in the mind, it is necessary that we briefly consider the mechanism of thought, in order to appreciate the nature of insanity itself. While the mind, and its workings, is as yet, but imperfectly understood in all of its phases, there are some general functions which are determined and may be used as a premises for deductions as to its other features. Stripped of their medical phraseology, the phenomena of thought are these:

§ 18. Mechanism of thought

Through the agency of the five senses, sight, hearing, smell, taste, and touch, impressions of the physical world around us are conveyed to, and impressions made upon, the brain. This gives rise to *consciousness*. In simpler terms, we might say that mental pictures are photographed upon the brain, which present themselves to the "mental eye." Most of the impressions so made are thought to be so temporary in their character that we never become to any appreciable extent cognizant of their existence; but some of the impressions remain for a more or less protracted

Rep. 811; Davis v. U. S., 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651; Butler v. State, 102 Wis. 364, 78 N. W. 590; Carr v. State, 96 Ga. 284, 22 S. E. 570; State v. Knight, 95 Me. 467, 50 A. 276, 55 L. R. A. 373; Waters v. Connecticut Mut. Life Ins. Co., 2 F. 892.

[11] Kimberly's Appeal, 68 Conn. 428, 36 A. 847, 57 Am. St. Rep. 101, 37 L. R. A. 264, note; Mathews v. Nash, 151 Iowa, 125, 130 N. W. 796.

period, and this gives rise to the phenomena of *memory*. After a number of these impressions, or pictures, are formed and retained in the memory, we are ordinarily able to associate them with one another, so as to form a harmonious, composite picture or series of pictures; and the phenomena of *judgment* appears. The mind, then, becomes in time a picture gallery of vast capacity, by means of which we are enabled to call up almost at will, images of the physical world, connect them with one another, and form *ideas*. This ability to so form ideas constitutes *mind* in the psychical sense.

§ 19. Effect of derangement

It is evident that if, through some defect of the senses or disease of the brain, impressions cannot be received, or, if received, cannot be retained, that there can be no ideas formed; and if the impressions, once received, cannot be placed in logical relation to one another because of the loss of the power of logical association, judgment, the ideas so formed can be of little practical value. This is what occurs when the subject becomes insane. It is not hard to understand that the brain may refuse to receive impressions because of injury or nondevelopment, and that disease may cause a weakening of the brain, with a consequential loss of memory; but the loss or absence of the power of logical association of ideas calls for a more detailed explanation.

§ 20. Association of ideas

Even in a healthy state, men's minds are filled with *ideas* which are nothing more than haunting memories of things he has seen and heard—at times magnified and distorted. We call it *imagination*. The more these images are magnified, the more "vivid" we say the imagination is. It may be so vivid that the ordinary creatures of the workaday world are seen as "dragons" and "frankenstines." It is thus we "daydream" and build "castles in Spain." We can all remember how, when children, we distorted the things about us into *fairies* and *hobgoblins* and *things* we knew not what. The phantoms of the world of

thought flit through our minds, often unbidden; but they pass without seriously affecting our actions, for the sense we call "judgment," or "reason," tells us that one is real and the other is unreal. Psychology recognizes this, and calls it *phantasy*.[12] But let us suppose that this sense of reason, or judgment, is weakened or destroyed; how, then, can one tell the real from the distorted shadow? Examples of these conditions are seen when, as children, we peopled the dark with awful monsters and cowed from them under the bedclothes, and in the phantom of dreams, when reason and judgment is absent, and we writhe in the "nightmare," which is nothing more than distorted ghosts of things we have seen and heard during our waking hours. When, then, disease or accident destroys reason and judgment, so that we can no longer tell the substance from the shadow, the facts from the fancies, and we can no longer identify the multitude of images that troop through our minds for what they are, it is evident that we are as likely to follow the leadings of the unreal fancies as we are to follow the memories of the events that have actually happened. Memories of a faithful dog are distorted into a fancied monster. Fancied wrongs we have heard or read of are associated with friends in place of kind favors we have actually received, and to the distorted mind such friends become implacable enemies striving to injure one. Such comparisons will give the reader some idea of the state of mind the law knows as "mania." [13]

§ 21. As test of derangement

This loss of reason should be kept in mind in distinguishing the legal, or *intellectual*, mania from that which is known as *moral* mania. The test is the power to rightly associate memories of a thing with the thing itself.

[12] Davis' Elem. Psych. § 195.
[13] Davis' Elem. Psych. § 195.

§ 22. Inflamed mind, or mania

With this theory of the state of mind of the person affected with mania before us, we will now notice briefly the theory of the causes which give rise to this abnormal condition of the mind.

Unlike idiocy, imbecility, or dementia, where there is an absence of memory and reason because of the nondevelopment or breaking down of the brain cells, mania is generally considered to be the result of a disease or affection of the brain, which results in an irritation of such cells and disturbs it in the exercise of its functions. The resulting mental disturbance is what is usually spoken of by the courts as a disease of the mind, in distinguishing legal insanity from that arising from some weakness of the will, impulse of the emotions, or evil propensity. At first, the portion of the brain actually affected may, and usually is, relatively small, and the consequent derangement almost imperceptible. As the other portions of the brain remain for a time in an apparently healthy condition, the subject may be perfectly rational, even unusually bright, on all matters which do not find their seat in the affected portion of the brain. Thus we have what is known as *monomania,* or mental derangement as to a single subject or group of subjects.[14]

§ 23. Immediate physical causes

It is now generally thought that the activities of the mind, and the intensity of ideas dwelling therein, vary with the amount of fresh blood pumped through the brain. If there is a sluggish circulation, the mind becomes dull and "sleepy," as we have all experienced after periods of inactivity, when the blood has been allowed to stagnate from inaction, or when from excessive fatigue the blood is withdrawn from the brain to aid in rebuilding the wasted portions of the body. If, on the other hand, the amount of blood carried to the brain is appreciably increased,

14 Ekin v. McCracken, 11 Phila. (Pa.) 538.

the brain action is stimulated, and ideas are increased in number and intensity until they become distorted.[15] A common example of this is seen where fever increases the action of the heart and the amount of blood sent to the head, until the patient becomes delirious. It not infrequently happens that an affection of the brain, not only weakens the brain cells, but will cause an irritation of the brain, which will, in turn, call an unusual amount of blood to the affected region. The result is an unusual mental activity and a consequent derangement of more or less extent. As irritation of the affected part of the brain may increase or diminish in accordance with the subject's bodily health, the periods of derangement will naturally be followed by periods of sanity, and we have what is known in law as *periodic* or *intermitting,* insanity, giving rise to the well-recognized doctrine of *lucid interval.*[16]

§ 24. Effect of mental activity

It is a matter of common knowledge that the circulation and heart action may be increased by excitement, anxiety, or fright. It therefore follows that the person in whose brain the irritation of the tissues has temporarily abated may remain perfectly rational until some strong emotion sends an increased supply of blood coursing through the brain, already weakened by disease. The ideas then become quickened and distorted, latent feelings, fancied wrongs, and petty resentments are awakened, power to rightly associate ideas becomes weakened or lost, and an apparently harmless citizen becomes a raving lunatic. It is very difficult sometimes to distinguish between mere rage, induced by lack of self-control, and an insane frenzy, induced by a diseased mind. The foregoing is the history of some of the cases of what is known as *homicidal mania.*

[15] Ekin v. McCracken, 11 Phila. (Pa.) 538.
[16] Lucid Interval, § 47.

CHAPTER 4

FORMS OF INSANITY

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§ 25. Forms of, generally

The diseases of the brain, and their attendant forms of insanity, are as varied as the other ills that affect the human body. They vary in severity, in duration, and in the scope of their derangement. They also vary as to the time in the life of the sufferer at which they appear, as to their effect upon him, and as to the cause from which they spring. Children come into the world with diseased brains as the heritage bequeathed them by some profligate ancestor; and the aged, approaching dissolution, pass into their "second childhood." Numerous, and more or less successful, attempts have been made to classify them, but for the purpose of this work we think the various classes of insanity may be considered as falling into three classes, viz.: (1) Amentia, commonly known as idiocy and imbecility; (2) mania, which perhaps agrees very closely with the class commonly known as lunacy; and (3) dementia. We will notice each of these classes in turn.

§ 26. Amentia, generally

The class of insanity known as *amentia* is, as its name implies, an absence of mind. It is due to the nondevelopment of the reasoning faculties, and usually extends from infancy.[1] The cause for such condition is usually found in some deficiency that leads to arrested development, and frequently finds its first cause in some disease of the parents, in consanguineous marriages, etc. In

[1] People v. Lake, 2 Parker, Cr. R. (N. Y.) 215; Browning v. Reane, 2 Phillimore, 69.

rare cases, this nondevelopment of the mind is due to the absence of some or all of the five senses, sight, hearing, etc., through which the outside world reaches the seat of reason.[2] Thus the mind is blank because the knowledge of the world around it has not been able to penetrate to it, in much the same manner as a photographic plate is blank where the outside light has not been able to reach it. However, one born deaf and dumb only is no longer considered an idiot, as he may receive impressions from outside through the medium of the sight.[3]

§ 27. Kinds of amentia

Amentia, as a form of insanity, is generally considered as falling into two classes, viz.: (1) Idiocy, where there is practically an entire absence of mind; and (2) imbecility, where there is yet a glimmering of intelligence. The distinction is important only in the realm of medicine; but, as the scope of this work is to look into the legal aspect only, it is sufficient to say that both classes show a want of mind sufficient to bring them within the accepted term of legal insanity.[4]

§ 28. Amentia as result of deafness, etc.

We noticed supra that amentia, as a form of legal insanity, is sometimes the result of the isolation of the mind of the sufferer by the fact that all or a part of the five senses are absent, and that by reason of that fact the mind has been unable to receive impressions from the outside world. One born deaf, dumb, and blind will be presumed to be an idiot.[5] There is an absence of two of the most important senses and the chief means of expression, and it is so improbable that a mind so isolated can have

[2] Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441; Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187.

[3] Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187.

[4] Black, Law Dict., tit. "Amentia"; 4 Words and Phrases, First Series, 3381; Somers v. Pumphrey, 24 Ind. 231, 244; Campbell v. Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167.

[5] 1 Bl. Com. 304; Harrison's Chancery, 490; Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187.

any opportunity of development that the ordinary presumption of sanity will be overcome. But this is only a presumption, and may be rebutted by showing that the subject is in fact possessed of sufficient understanding to render him sane.[6] The courts have refused to extend the presumption further, and the mere fact that one is deaf and dumb will not raise a presumption of idiocy, even where such condition has existed from birth.[7] In such case, there is still present the important sense of sight, and the inability to communicate by speech may be made up for by other means of expression, such as writing, deaf and dumb alphabet, etc.

§ 29. Mania, generally

The second class of insanity is that of *mania.* As amentia is described as a want of mind, so mania may be described as a disordered mind. It is spoken of as a general perversion of the mental faculties, accompanied by more or less excitement.[8] This class is much larger than that of amentia, and comprises by far the larger classes of the different forms of insanity, and especially those forms known, in the main, to criminal law. The forms in which it appears are widely varied and hard to classify. In addition to what we have already noticed, it differs from amentia in that it usually occurs at the time of or after the maturity of the mentality, and that it is an inflamed mind, rather than an undeveloped one. This is the same form of insanity as that frequently spoken of by text writers as *lunacy.*[9]

[6] Barnett v. Barnett, 54 N. C. 221; Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441; Com. v. Hill, 14 Mass. 207.

[7] State v. Howard, 118 Mo. 127, 24 S. W. 41; Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441; Green's Adm'r v. Mason, 84 Vt. 289, 79 A. 48.

[8] Chap. Med. Jur. 221; Whart. & S. Med. Jur. p. 60; Denson v. Beazley, 34 Tex. 191, 215.

[9] Crosswell v. People, 13 Mich. 427, 436, 87 Am. Dec. 774; Owings' Case, 1 Bland (Md.) 370, 386, 17 Am. Dec. 311; Owings' Case, 1 Bland (Md.) 370, 17 Am. Dec. 311; Chitty Med. Jur. cited in Crosswell v. People, 13 Mich. 427, 436; In re Vanauken, 10 N. J. Eq. 186; In re Brugh, 61 Hun, 193, 197, 16 N. Y. S. 551.

§ 30. Mania—General classes

For convenience in discussing the many forms of mental derangements grouped under the general head of mania, they are divided into two general classes, viz.: (1) *Intellectual mania;* and (2) *moral mania.* The first class—i. e., intellectual mania—is again subdivided into (a) *permanent intellectual mania* and (b) *temporary intellectual mania;* and the second class, moral mania, is subdivided into (a) *moral mania proper* and (b) *moral-intellectual mania.*

§ 31. Intellectual mania

Intellectual mania is that class of mania which grows out of a perversion of the intelligence, or reasoning powers, as distinguished from the moral nature, and embraces by far the larger part of the kinds of mania recognized by the courts as legal insanity. Its division into permanent and temporary intellectual mania depends on whether it is temporary or permanent in its nature.

§ 32. Permanent intellectual mania

Permanent intellectual insanity includes those classes of intellectual insanity which are continuous in their effect upon the mind of the subject. It may be either total or partial. Where it extends, in effect, to the whole mind, so as to blot out all rational ideas, and holds the sufferer in a state of helpless, unaccountable lunacy, it is known to the law as general or habitual insanity.[10] In some cases it may be continuous in its effect, but extend to and affect only a portion of the mind, and the person is said to be affected with partial insanity and is irresponsible before the law for any act done with relation to which he is deranged. That is to say, he will not be accountable for those acts which find their impulse for their commission in the affected portion of the mind;

[10] Wright v. Market Bank (Tenn. Ch. App.) 60 S. W. 623; State v. Moore, 80 Kan. 232, 102 P. 475, 477; Com. v. Wireback, 190 Pa. 138, 42 A. 542, 70 Am. St. Rep. 625; Hudson v. Hudson, 144 N. C. 449, 57 S. E. 162.

but for all other acts he will be treated as sane.[11] There are a number of well-recognized forms of this last class of intellectual mania, and they are known generally as *monomania.*

§ 33. Monomania

Monomania, as its name implies, is that class of intellectual mania which affects the mind of the subject as to one subject, or a limited number of subjects.[12] Practically the same kind of insanity is known to the medical profession as *paranoia.*[13] The person so affected may be perfectly rational, and even unusually bright, as to all other subjects; and be insane as to the particular subject which incites the mania. The supposed cause, as we have seen supra,[14] is that the subject with reference to which the insanity exists finds its seat in a diseased portion of the brain, while the remainder of the brain remains in a relatively healthy condition. This class of insanity usually manifests itself in some form of delusion or *hallucination.*

§ 34. Delusion and hallucination

A *delusion* is a settled belief in facts that have no actual existence.[15] Some of the courts have added to this definition the words, "and which no rational person would believe." [16] A *delu-*

[11] Denson v. Beazley, 34 Tex. 191; Taylor v. Trich, 165 Pa. 586, 30 A. 1053, 44 Am. St. Rep. 679.

[12] 2 Bouv. Law Dict. 435; State v. John, 30 N. C. 330, 49 Am. Dec. 396; Desty, Am. Cr. Law, § 24a; Thompson v. Thompson, 21 Barb. (N. Y.) 107, 120; Merritt v. State, 39 Tex. Cr. R. 70, 45 S. W. 21; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231.

[13] Jackson v. Jackson [1908] p. 308, 77 L. J. P. 147, 24 Times Law Rep. 674, 52 Sal. J. 535, 5 British Rul. Cas. 452.

[14] See supra, § 33.

[15] Prather v. McClelland, 76 Tex. 576, 13 S. W. 543; In re White, 121 N. Y. 406, 24 N. E. 935; Kimberly's Appeal, 68 Conn. 428, 36 A. 847, 37 L. R. A. 261, 57 Am. St. Rep. 101; 4 Words and Phrases, First Series, p. 3644; 1 Bouv. Law Dict. "Delusion," p. 831.

[16] Prather v. McClelland, 76 Tex. 574, 13 S. W. 543; Vance v. Upson, 66 Tex. 476, 1 S. W. 179; Kimberly's Appeal, 68 Conn. 428, 36

sion is distinguished from an *hallucination,* in that the latter is a mere temporary erroneous perception, that may ripen into a settled belief, and so become a delusion.[17] The feature which chiefly distinguishes the two is permanence on the part of the former and the transient nature of the latter. Delusions, because of their settled and continuous nature, are recognized in law as a species of legal insanity.[18] Hallucinations, on the other hand, because of their transientness, have not found complete recognization as insanity. In this connection, it is held that hallucinations are not per se insanity, but it must be shown to have existed at the time of the transaction in question, and to such an extent that it will amount to insanity, before it will be regarded as such.[19]

§ 35. Test of delusion

To constitute a delusion in the legal sense of the term, the erroneous belief must relate to material things or facts in the physical world. It may not relate to abstract questions or theories, such as law, politics, or religion,[20] seemingly absurd beliefs in the operations of natural laws,[21] belief in the transmutation of the soul from human beings into beasts,[22] belief in spir-

A. 847, 37 L. R. A. 261, 57 Am. St. Rep. 101; Matter of Mason, 60 Hun, 46, 51, 14 N. Y. S. 434; In re Hemingway's Estate, 195 Pa. 291, 45 A. 726, 78 Am. St. Rep. 815.

[17] People v. Krist, 168 N. Y. 19, 60 N. E. 1057; see Wood Am. Text Book of Medison. Bensberg v. Washington University, 251 Mo. 641, 651, 158 S. W. 330.

[18] 4 Words and Phrases, First Series, p. 3644; State v. Wilner, 40 Wis. 304, 306; Wray v. Wray, 32 Ind. 126, 131; In re Hemingway's Estate, 195 Pa. 291, 45 A. 726, 78 Am. St. Rep. 815.

[19] Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 A. 253; Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 A. 253; McNett v. Cooper, 13 F. 586.

[20] Guiteau's Case, 10 F. 161.

[21] Prinsep v. Dyce Sombre, 14 Eng. Reprint, 480; Owen v. Crumbaugh, 228 Ill. 380, 81 N. E. 1044, 119 Am. St. Rep. 442, 10 Ann. Cas. 606; Medill v. Snyder, 61 Kan. 15, 58 P. 962, 78 Am. St. Rep. 307; Denson v. Beazley, 34 Tex. 191.

[22] In re Bonard's Will (N. Y.) 16 Abb. Prac. (N. S.) 128; Chafin Will Case, 32 Wis. 557.

itualism,[23] a belief in witches and witchcraft,[24] or even uncalled-for and groundless affections, antipathies, and prejudices.[25] The reason for the rule may be somewhat hard for the lay mind to understand, but its real practicability cannot be disputed. Such matters are, after all, but opinions and surmises. Men's minds, as they have a right to, differ as to the abstract. Advancing science and learning has too often demonstrated that the theory of to-day, demurred to and even scoffed at, may be the fact of to-morrow, accepted as such by all enlightened minds. However absurd a mere conclusion of the mind may seem, no one can prove its falsity to a certainty. The wisest heads of Europe shook their heads in pity when Columbus asserted that an obviously flat world was round; Galileo barely escaped incarceration when he first ventured to tell of the wonders in the sky his telescope revealed; and King Agrippa, when Paul stood before him to tell of a new faith that knew no kingdom but the soul, exclaimed: "Saul! Saul! Much learning doth make thee mad!" [26]

[23] Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422; Middleditch v. Williams, 45 N. J. Eq. 726, 17 A. 826, 4 L. R. A. 738.

[24] Child v. Rompf, 4 S. W. 235, 9 Ky. Law Rep. 121; Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81; Kelly v. Miller, 39 Miss. 19; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Van Guysling v. Van Kuren, 35 N. Y. 70.

[25] Hall v. Hall, 38 Ala. 131; Barnes v. Barnes, 66 Me. 286; Trumbull v. Gibbons, 22 N. J. Law, 117; 27 L. R. A. (N. S.) 74 et seq.; In re Ames' Will, 40 Or. 495, 67 P. 737; Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405; In re White, 121 N. Y. 406, 24 N. E. 935.

[26] In re White, 121 N. Y. 406, 24 N. E. 935; see 37 L. R. A. 268, IX, and Decennial and Other Key-Number Digests, Wills, ⟸38; Denson v. Beazley, 34 Tex. 191, 199.

§ 36. As distinguished from mistaken belief

Insane delusion should be carefully distinguished from a *mistaken belief*.[27] A person may have seemingly unusual and unfounded beliefs as to facts, without being counted insane. The test for a delusion in this respect is defined by the courts, as a persistent, erroneous belief in the existence of facts that have no actual existence, and that the person, having once formed the belief, cannot be convinced of his error by proof, argument, or reason.[28]

§ 37. As distinguished from unsound mind

Although the term *insane delusion* has been spoken of as synonymous with that of *unsound mind*,[29] the former is a much more restricted term than the latter. A delusion may not even amount to unsound mind, and where partial insanity, delusion, or hallucination is relied upon to excuse or avoid an act, it must be made to appear that the act was the offspring of such mental disturbance, and not the result of reason. In other words, a delusion may or may not amount to unsound mind, depending upon the circumstances of each case.[30]

[27] In re Kendrick's Estate, 130 Cal. 360, 62 P. 605; Owen v. Crumbaugh, 228 Ill. 400, 81 N. E. 1045, 119 Am. St. Rep. 442, 10 Ann. Cas. 606.

[28] Guiteau's Case, 10 F. 161; State v. Lewis, 20 Nev. 333, 22 P. 241; Potter v. Jones, 20 Or. 239, 25 P. 769, 12 L. R. A. 161; In re White, 121 N. Y. 408, 24 N. E. 935; Bundy v. McKnight, 48 Ind. 502, see 27 L. R. A. (N. S.) 68 et seq.; Denson v. Beazley, 34 Tex. 191, 213; Smith v. Smith, 48 N. J. Eq. 566, 570, 25 A. 11; Kimberly's Appeal, 68 Conn. 428, 36 A. 847, 57 Am. St. Rep. 101, 37 L. R. A. 261.

[29] Nicewander v. Nicewander, 151 Ill. 156, 37 N. E. 698.

[30] English v. State (Tex. Cr. App.) 46 S. W. 637; People v. Griffith, 146 Cal. 339, 80 P. 68. See 27 L. R. A. (N. S.) 71 et seq.; Wilcox v. State, 94 Tenn. 106, 28 S. W. 312.

§ 38. Requisites of delusion

In order for a delusion to constitute an excuse in law, two things or conditions must appear, viz.: (1) It must appear, as we have noticed above,[31] that the act in question is the product of the delusion.[32] A delusion relates to only a restricted field of action, and only those acts coming within that field are affected by it. (2) The delusion must be of such a character that, if the facts were actually as the alleged non compos thought them to be, the act springing from the delusion would be justified.[33] In other words, it must be of a character such as would incapacitate the defendant from distinguishing between right and wrong in a criminal matter,[34] or the fact appear so far different from the actual facts in a civil action as to lead to an erroneous conclusion.[35] Unless the delusion incapacitates the mind to reason to this extent, it is not recognized in law, however the ideas called forth by the delusion may differ from the ideas of ordinary minds.

§ 39. Kinds of delusions

For judicial purposes, delusions are divided into two classes by the courts and text writers. These divisions are based upon the nature of the derangement. Strictly speaking, perhaps, only one of these classes can properly be termed delusion; the other class amounting to a total perversion of the mind, which is merely manifesting itself through delusive mental ideas.

[31] See supra, § 16(c).

[32] English v. State (Tex. Cr. App.) 46 S. W. 637.

[33] Riley v. State (Tex. Cr. App.) 44 S. W. 498; Denson v. Beazley, 34 Tex. 191; Thurman v. State, 32 Neb. 224, 49 N. W. 338; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; Merritt v. State, 39 Tex. Cr. R. 70, 45 S. W. 23; People v. Taylor, 138 N. Y. 398, 34 N. E. 275.

[34] See note 33, supra; Lowe v. State, 44 Tex. Cr. R. 224, 70 S. W. 206; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458.

[35] Haines v. Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; Florey's Ex'rs v. Florey, 24 Ala. 241; Epworth Memorial Methodist Church v. Overman, 185 Ky. 773, 215 S. W. 942; Taylor v. Trich, 165 Pa. 586, 30 A. 1053, 44 Am. St. Rep. 679.

§ 40. Systematized delusions

The first of these divisions, or that of delusions proper, is known as *systematized delusions,* and is defined as being a delusion that so affects the subject that he can give a reason for all assertions he makes with reference to the delusion.[36] Systematized delusions manifest themselves in two forms, namely, paranoia and hysterical delusions, both of which will be considered under another head.[37] The distinguishing feature of systematized delusions is that the affection of the brain has not proceeded to the extent of destroying the logical control of the mind over the whole range of thought, but merely disarranged it in the region actually affected, and allowing the subject to reason correctly as to all matters not finding their seat in the affected region, that is, in the brain cells affected by the disease which causes the mania in the first place. This division comprises delusions proper, as it conforms more nearly to the definition of delusions occurring under the general head of monomania.

§ 41. Unsystematized delusions

The second division is what is generally known as *unsystematized delusions.* As its name implies, this is the condition where the mind of the affected person has lost the power of systematic association of ideas and sequence of thought. No attempt is made by such person to base his assertions upon any reason that might seem to justify the delusion, but they merely follow the disjointed and unrelated ideas of a mind that has broken away from all logical reasoning and wanders where the vagaries of the moment lead.[38] The mind of the person so affected will usually be filled with a variety of, and frequently wholly unconnected, ideas, from one to another of which he will wander,

[36] Clevenger, Med. Jur., p. 50; Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 491; Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405.

[37] See infra, § 49 et seq.

[38] Clevenger, Med. Jur., p. 50; Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 491.

without purpose or any seeming logical reason therefor. One moment he may imagine himself a preacher, charged with converting the world, and the next moment he may think he is in search of a hidden treasure, and yet another time he may declare himself an inventor, with some inventive idea that will revolutionize modern industry.[39] The inflammation of the brain in such case has probably spread to a much greater area than in the division we have previously discussed, and the resulting affection of the mind has passed beyond the stage of delusion proper, and has become lunacy.

§ 42. Characteristics of

In delusions of this character, the whole mind is usually more or less affected. The extended area of affection has usually been sufficient to affect the whole of the mind to a more or less extent. In this respect, it differs from delusion proper, where the derangement is confined to certain objects or classes of objects or subjects.

§ 43. Forms of monomania in general

As indicated supra, monomania is a derangement as to one subject or group of subjects,[40] and is usually manifested by one delusion.[41] It may take any variety of forms, depending upon the portion of the mind affected by the disease which gives rise to the delusion. In some cases, the delusion may be harmless; in others, it may render the subject dangerous in the extreme.

§ 44. Particular forms of monomania

Generally speaking, the forms of insanity fall into two classes, viz.: First, where the feelings and propensities are marked by unusual activity; and, second, where such feelings and propensities are marked by morbidness. The example of the first

39 Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 491.

40 Haines v. Hayden, 95 Mich. 332, 354, 54 N. W. 911, 35 Am. St. Rep. 566; People v. Lake, 2 Parker Cr. R. (N. Y.) 215, 218.

41 Desty, Am. Cr. Law, § 25d; State v. John, 30 N. C. 330, 49 Am. Dec. 396.

class that has most often, perhaps, been seen in our courts is that of *homicidal mania.* This is described as an irresistible impulse to kill,[42] and approaches very much to what is known as *insane frenzy,* but which is not identical with it, as will be seen hereafter. Here the feelings and tendencies are inflamed and distorted along the lines of the particular mania. An example of the latter class is seen in such forms of monomania as *fanatica mania,* which is characterized by morbid state of religious thought;[43] *erotic mania,* or *erotomania,* an unnaturally morbid state of the mind with reference to sexual propensities;[44] and *kleptomania,* which, briefly, is a morbid propensity to steal.[45] All of these partake, to a more or less extent, of the form of moral insanity, and will be more fully discussed under that head.[46]

§ 45. Temporary insanity, in general

Not only may the insanity of a person be partial with reference to the mind as a whole, as we have seen supra, in the case of monomania, but it may also be partial with reference to the period of time over which it extends. In such cases, the mania makes its appearance intermittently, and at all other times the mind of the person affected appears normal, or nearly so. The supposed reason for this phenomena has already been discussed supra. Under the general term of temporary insanity, as we shall hereafter use it, will be included, not only temporary insanity growing out of a diseased mentality, but also those temporary spells of mental aberration brought on by external means, as by the intemperate use of intoxicating liquors, by drugs, etc.[47]

[42] Com. v. Sayre, 5 Wkly. Notes Cas. (Pa.) 424.
[43] Ekin's Heirs v. McCracken, 11 Phila. (Pa.) 534.
[44] 1 Bouv. Law Dict. 687.
[45] 4 Words & Phrases, First Series, p. 3644.
[46] Infra, § 68 et seq.
[47] Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 37 Am. St. Rep. 811, 18 L. R. A. 421.

§ 46. Characteristics

Temporary insanity proper is the term applied to those periodic mental aberrations which arise from a diseased mind. It is sometimes spoken of as "occasional," or "intermitting" insanity.[48] It consists of occasional periods of derangement, separated from one another by more or less protracted periods of sanity, during which the mind returns to the normal. These rational periods are generally spoken of as "lucid intervals." But the term *lucid interval* is used in this connection in a very loose sense, and would seem, in the strict sense of the term, to apply to a brief period of sanity occurring in the case of a more or less permanent derangement.

§ 47. Lucid interval

As we have indicated in the foregoing paragraph, the term "lucid interval," as here used, is a temporary restoration to sanity of one who is ordinarily insane; that is, a temporary rift in the cloud of madness, during which there is a return to the normal from a legal standpoint.[49] While a lucid interval does not necessarily mean a perfect restoration of health and reason,[50] yet it does mean such a restoration of the reasoning faculties as will enable the person to exercise a sound and reasonable judgment with reference to the matter in hand.[51] Some of the cases seem to go farther, and to hold that the mind must be restored to the same state of reason it enjoyed before the attack of insanity; but we think the general rule, under the decided weight of authority, is as stated above.

[48] Raymond v. Wathen, 142 Ind. 367, 41 N. E. 815; Howard v. State, 37 Tex. Cr. R. 494, 36 S. W. 475, 66 Am. St. Rep. 812.

[49] 2 Bouv. Law Dict. p. 2056; Whart. & S. Med. Jur. § 2.

[50] Godden v. Burke's Ex'rs, 35 La. Ann. 160; Ricketts v. Jolliff, 62 Miss. 440; In re Miller's Will, 26 Del. (3 Boyce) 477, 85 A. 803, 811; Ekin's Heirs v. McCracken, 11 Phila. (Pa.) 534.

[51] In re Miller's Will, 26 Del. (3 Boyce) 477, 85 A. 803, 811; King v. Gilson, 191 Mo. 307, 90 S. W. 367; Ekin's Heirs v. McCracken, 11 Phila. (Pa.) 534, 539; Frazer v. Frazer, 2 Del. Ch. 260.

§ 48. Nature and duration

The temporary restoration of the mental faculties need not be for any definite time, so long as it is actual. On the other hand, the insane periods which precede and follow it may be of very short intervals, so long as the insanity is actual while it lasts. The question is as to the actual existence of insanity, with intervening periods of actual restoration of the mental faculties. But, as indicated supra, the doctrine of the lucid interval would seem to apply in the strict sense to cases of permanent insanity rather than to those of temporary insanity. This is clearly recognized in the rules of evidence, which refuse to apply to temporary insanity and lucid intervals alike the rules and presumptions which are applied to permanent insanity, as will be noted in the chapter on Evidence.[52] As has been said, the law books look askew at short periods of alleged insanity, occurring at intervals convenient to the exercise of acts sought to be excused, but preceded and followed by periods of perfect sanity. In the language of the Pennsylvania court: "The doctrine that an individual can be entirely sane immediately after an act is committed, and yet insane at the instant it was committed, is contrary to every principle of psychological science." [53] The great difficulty of the courts in determining the actual fact of the state of mind that exists for a short period has led them into a tendency to disregard such short changes. The state of the mind is reflected through the acts, expressions, etc., only, and where the period is so brief that the acts have not sufficient time within which to accurately indicate the mental state, the difficulty of accurately gaging the mental condition is evident. For the same reason, the presumption of the law is against the occurrence of short intervals in cases of permanent insanity.[54]

[52] See ante, §§ 525, 527.

[53] Com. v. Wireback, 190 Pa. 138, 42 A. 542, 70 Am. St. Rep. 625; See Carpenter v. Carpenter, 8 Bush (Ky.) 283.

[54] Leache v. State, 22 Tex. App. 279, 3 S. W. 543, 58 Am. Rep. 638; State v. Lowe, 93 Mo. 547, 5 S. W. 889; Gardner v. Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340.

§ 49. Kinds of temporary insanity, in general

Temporary insanity is the term applied to transitory spells of mental derangements, preceded and followed by a sane condition of the mind. While it usually marks the first inception of more settled derangement, this is not necessarily so. The period covered by such mental aberration is so uncertain that positive proof of its existence is required. There are classes of mental disturbance coming under this term that do not amount to legal insanity, or only amount to legal insanity under certain conditions. A number of kinds or classes of mental disturbances fall under this head as follows:

§ 50. Emotional insanity

Puerperal, or emotional, insanity, is, as its name implies, a temporary clouding of the mind by emotion which has passed beyond the control of the person affected. The term has been applied by the courts to persons in possession of their ordinary reasoning faculties, but who allow their passions to convert them into temporary maniacs, or "mania transitoria." [55] It has been identified in some cases with frenzy,[56] or ungovernable passion, and which the courts have refused to countenance as a form of legal insanity; [57] but it is in fact a much broader term, and includes all mental disturbances which find their seat in the nerves, rather than in a diseased mentality. It is recognized as related to, though not identical with, epilepsy on one hand and the so-called "religious" or moral insanity on the other.[58]

[55] Mutual Life Ins. Co. v. Terry, 15 Wall. (82 U. S.) 580, 21 L. Ed. 236; Leache v. State, 22 Tex. App. 279, 3 S. W. 543, 58 Am. Rep. 638; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408.

[56] Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408.

[57] Com. v. Renzo, 216 Pa. 147, 65 A. 30.

[58] Taylor v. United States, 7 App. D. C. 27; Harrison v. State, 44 Tex. Cr. R. 164, 69 S. W. 500.

§ 51. Legal aspect

In truth, emotional insanity, as we have already suggested, is not legal insanity in the strict sense of the term. It would seem to be a mere waning of the will control, through an impairment of the nervous system, without an appreciable impairment of the judgment. The person affected with it loses "will" control over his actions, and is subject to violent fits of passions, sexual perversion, etc., which his will is not sufficiently strong to control. Because of this, and the fact that it approaches very close to the doctrine of *irresistible impulse,* which will be discussed hereafter, the trend of modern authorities seem to be towards holding that it is not a form of insanity that will excuse or avoid acts done under its promptings; i. e., it is not legal insanity.[59] As a matter of public policy, persons cannot be allowed to excuse or avoid acts done with a consciousness of their import merely because of weakness of will or ungovernable passion.

§ 52. Epileptic insanity

Closely associated with emotional insanity is what is some times called *epileptic insanity,* a manifestation of epilepsy. Epilepsy is a nervous disease, and as a form of nervous disorder is not of itself evidence of insanity, more than any form of disease is evidence of that fact;[60] but it is well recognized as a condition superinducing insanity, where it reaches and affects the brain, as it often does.[61] Also epilepsy and epileptic fits may be a circumstance tending to show insanity, where it appears that the disease

[59] Taylor v. United States, 7 App. D. C. 27; People v. Trebilcox, 149 Cal. 307, 86 P. 684; Denson v. Beazley, 34 Tex. 191.

[60] Lovegrove v. State, 31 Tex. Cr. R. 491, 21 S. W. 191; In re Derusseau's Will, 175 Wis. 140, 184 N. W. 705, 16 A. L. R. 1412; Behsman v. Behsman, 144 Minn. 95, 174 N. W. 611, 7 A. L. R. 1501; Oborn v. State, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966; Furlong v. Tilley, 51 Utah, 617, 172 P. 676.

[61] People v. Gambacorta, 197 N. Y. 181, 90 N. E. 809, 18 Am. Ann. Cas. 425 (see cases cited); Oborn v. State, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966.

has proceeded so far as to affect the reasoning powers and subvert the judgment.[62]

§ 53. Drunkenness in general

In addition to being, at times, stricken with madness through the agency of accident and disease, man's mind is sometimes clouded by his own deliberate folly, thus inducing a form of artificial, temporary insanity. The most frequent example, as well as the most ancient one, is that of intoxication through the intemperate use of alcoholic beverage. Another, and now very prevalent, form is a species of intoxication brought about by the use of narcotic drugs, commonly known as the "dope habit." While the usual effect is to produce a transitory derangement, and for that reason we are discussing the subject under the head of temporary insanity, yet it may at times give rise to a more settled affection of the mind, as we shall see infra.

§ 54. Its legal aspect in general

The effect of drunkenness, and its consequent affection of the mentality, has been one of the most controverted questions that has been before the courts. On the one hand, it is argued with seeming justice that no man should find excuse in a condition willfully brought about by his own deliberate act, and the result of which could be clearly foreseen. On the other hand, it is contended with force that, while the condition is self-induced, yet the person is actually without reason and intent, while in the condition is irresponsible for what he does, and is open to all kinds of imposition on the part of other persons. The rules of law that have been evolved are largely a compromise between the two views. In the administration of law with reference to civil matters, the last rule is followed, except as to torts, while in case of crime the courts accept the first view.

[62] Liddle v. Salter, 180 Iowa, 840, 163 N. W. 447; In re Rounds' Will, 25 Misc. Rep. 101, 54 N. Y. S. 710. See ante, notes 60 and 61.

§ 55. Drunkenness in civil law

Drunkenness existing to a degree such as will render a person incapable of understanding and appreciating the result of his acts will be recognized in civil matters and given the effect of legal insanity. Where a person, at the time of the making of a contract, is so intoxicated as to impair his mental faculties to the extent of rendering him non compos mentis, the contract will be voidable at the option of such person, and in the same manner as if he were insane.[63] The same rule applies to deeds and other conveyances of property. If the person is so intoxicated at the time of their execution that he is unable to understand the nature or the terms and conditions of the transaction, the conveyances are voidable.[64] Practically the same may be said with reference to wills. The intoxication must be actual and existing, but where it is shown[65] to a degree such as will deprive the testator of testamentary capacity, it will have the same effect in avoiding the will as other forms of mental derangement.[66]

§ 56. Present existence necessary

Following the general rule applied to temporary insanity, or transitory mental derangement, the derangement produced by intoxication must be shown to exist at the time of transaction in

[63] Wells et al. v. Houston, 23 Tex. Civ. App. 629, 647, 57 S. W. 584; Waldron v. Angleman, 71 N. J. Law, 166, 58 A. 568; Burns v. O'Rourke, 28 N. Y. Super. Ct. 649; Cameron-Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532; Decennial and Other Key-Number Digests, Contracts, ⊂92.

[64] Harmon v. Johnston, 1 MacArthur (8 D. C.) 139; Curtis v. Kirkpatrick, 9 Idaho, 629, 75 P. 760; Spoonheim v. Spoonheim, 14 N. D. 380, 104 N. W. 845.

[65] Matter of Ely's Will, 16 Misc. Rep. 228, 39 N. Y. S. 177; Starrett v. Douglass, 2 Yeates (Pa.) 46.

[66] Miller's Estate, 179 Pa. 645, 36 A. 139, 39 L. R. A. 220; Bannister v. Jackson, 45 N. J. Eq. 702, 17 A. 692; In re Wilson's Estate, 117 Cal. 262, 49 P. 172, 711; In re Will of Convey, 52 Iowa, 197, 2 N. W. 1084; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; Ball v. Kane, 1 Pennewill (Del.) 90, 39 A. 778.

question. A general showing of intoxication will not be sufficient. The reason for the rule is, of course, that the condition is one that is very temporary in its effect on the brain. The mind may be actually clouded at one time, and yet have shaken off the effects of the intoxication and become normal within the space of a few hours. Therefore the mere fact that a person is an habitual drunkard, or even that he was intoxicated at the time of a transaction, will not be sufficient to avoid it, in the absence of a showing that the effect upon the person's mind was such as to render him non compos.[67] Of course, the degree of intoxication must have been such as to render him non compos mentis for the time being, and the mental capacity of the person, under the circumstances of the case, is a question of fact for the jury.[68]

§ 57. Induced by others

We find this rule very much modified, where the intoxication of such person is brought about, or connived in, by the opposite party to the transaction. Here the act of such opposite party is treated as fraud, as it shows an inclination on his part to overreach the intoxicated party. In a case of this kind, the person need not be so intoxicated as to render him non compos in the usual sense, but a degree of intoxication sufficient to force the party intoxicated to act at a disadvantage will be sufficient to avoid a contract so induced,[69] and this would be especially true where it appears that the contract, or other transaction, is inequitable as to the intoxicated party. The effect of drunkenness on a person's capacity will be taken up more fully and discussed under heads of Contracts, Wills, etc.

[67] Harlan v. Brown, 4 Ind. App. 319, 30 N. E. 928; Browne v. Bachman, 31 Tex. Civ. App. 430, 72 S. W. 622; In re Hewitt's Will, 31 Misc. Rep. 81, 64 N. Y. S. 571; Fluck v. Rea, 51 N. J. Eq. 233, 27 A. 636.

[68] Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101.

[69] Storrs v. Scougale, 48 Mich. 387, 12 N. W. 502; Matthis v. O'Brien, 137 Ky. 651, 126 S. W. 156; Miller's Estate, 179 Pa. 645, 36 A. 139, 39 L. R. A. 220.

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§ 58. Induced by drugs

Practically all we have said supra with reference to the effect of mental incapacity produced by intoxicants will apply with equal force to temporary mental derangement produced by the recent use of drugs, cocaine, morphine, opiates, etc., and it will for that purpose be considered temporary insanity, so far as civil matters are concerned. Experience has shown that mental derangement produced by this means is even more violent than that brought about by the use of intoxicants, and the effect upon the brain far more lasting.

§ 59. Drunkenness in criminal law

In the administration of criminal law, the courts reason from the first premise; that is, that voluntary intoxication will not ordinarily excuse criminal acts committed under its promptings. This is because drunkenness itself begets crime, and the law can let no person put himself, by deliberate act, in a position where he is likely to commit crime, and then plead that condition in justification of the unlawful act he has committed under its promptings.[70] To hold otherwise would be to invite crime, the perpetrator easily escaping all punishment by taking the precaution of putting himself into a state of intoxication preparatory to committing the criminal act. As Judge Simkins, speaking for the Texas Court of Appeals, says in the leading case of Evers v. State, after an interesting discussion of the conditions which led up to the adoption of the rule in his state: "The underlying principle of the statute (embodying the rule) is that laid down by

[70] Davis v. Davis, 43 Iowa, 687; Chicago, R. I. & P. R. Co. v. Doyle, 18 Kan. 58; People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Stedham's Heirs v. Stedham's Ex'r, 32 Ala. 525; Garrison v. Blanton, 48 Tex. 299; Frost v. Wheeler, 43 N. J. Eq. 573, 12 A. 612; Morrison v. State, 38 Tex. Cr. R. 392, 43 S. W. 113; Collier v. State, 17 Okl. Cr. 139, 186 P. 963, 12 A. L. R. 839; State v. Kidwell, 62 W. Va. 466, 59 S. E. 494, 13 L. R. A. (N. S.) 1024; Harris v. United States, 8 App. D. C. 20, 36 L. R. A. 465; State v. Kraemer, 49 La Ann. 766, 22 So. 254, 62 Am. St. Rep. 664.

common-law writers, to wit, that a sane man, who voluntarily puts himself in such a condition as to have no control over his will or actions, must be presumed to have intended the consequences springing therefrom." [71]

There is, in addition, a further reason for the rule. In civil matters, the drunkard is dealing at arm's length with other independent persons, who have an opportunity of observing the condition of such intoxicated person, and the option of dealing with him or of refusing to do so; and, in case of rescission on the part of the intoxicated party, the other can usually be put back in statu quo by the return of the consideration. In case of criminal matters, however, the consummation of the act depends entirely upon the volition of the intoxicated party; and neither society nor the person injured has any voice in the commission of the act, or remedy after it has been done. It is clear that a different and stricter rule should be applied in the latter case from that applied in the former.

§ 60. Effect on responsibility for crime

It is therefore the rule at common law, in Texas, and in a majority of the states of the Union, that neither intoxication nor temporary insanity induced by the recent voluntary use of ardent spirits will excuse or mitigate the degree of crime.[72]

§ 61. Limitations to rule

The above rule is not without limitations:

(1) In case of homicide, temporary insanity induced by intoxication may, in some jurisdictions, be shown in order to re-

[71] Evers v. State, 31 Tex. Cr. R. 319, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811.

[72] Evers v. State, 31 Tex. Cr. R. 319, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; Director of Public Prosecutions v. Beard, [1920] App. Cas. 479, 12 A. L. R. 846; Hall v. State, 78 Fla. 420, 83 So. 513, 8 A. L. R. 1234; State v. O'Neil, 51 Kan. 651, 33 P. 287, 24 L. R. A. 555.

duce the crime to murder in the second degree by eliminating the ingredient of malice.[73]

(2) In cases where the essence of the offense with which the defendant is charged is the intent with which the criminal act is committed, intoxication at the time of the act may be shown as evidence of lack of such wrongful intent.[74] For example, where the offense charged is slander, there can be no malice on part of an intoxicated person, and hence no slander; or where the offense charged is assault with intent to kill, there can be no rational purpose on the part of the intoxicated defendant, and hence no *intent to kill*. Such testimony of intoxication is admitted, not as a defense, but as showing lack of an essential ingredient of the crime in question.[75] In this connection, distinction must be made between crimes where malice or intent can be implied from the act, and where it must be actually present. Intent is considered as being necessary in all forms of crime, but it may ordinarily be implied. For example, intent is necessary to crime of murder, but fact that one is intoxicated at the time will not eliminate a criminal intent as it will be implied from the act of homicide, but an assault to murder is made out only by linking the act of assault with the actual intention of carrying it further and committing another act, which rests only in the intention. Such an intent cannot be implied. For the same reason, while malice may be implied from the criminal act itself, yet where it is a necessary ingredient of the crime itself, intoxication at

[73] Evers v. State, 31 Tex. Cr. R. 319, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; Whart. Cr. Law, p. 51; Hall v. State, 78 Fla. 420, 83 So. 513, 8 A. L. R. 1234; Heninburg v. State, 151 Ala. 26, 43 So. 959; Cheadle v. State, 11 Okl. Cr. 566, 149 P. 919, L. R. A. 1915E, 1031; State v. Trivas, 32 La. Ann. 1086, 36 Am. Rep. 293; Buckhannon v. Com., 86 Ky. 110, 5 S. W. 358; State v. Kidwell, 62 W. Va. 456, 59 S. E. 494, 13 L. R. A. (N. S.) 1024.

[74] Commonwealth v. Hagenlock, 140 Mass. 125, 3 N. E. 36; 1 New Eng. Rep. 105; Reg. v. Cruse, 8 Car. & P. 581; Reg. v. Monkhouse, 4 Cox, Cr. Cas. 55; State v. Rumble, 81 Kan. 16, 105 P. 1, 25 L. R. A. (N. S.) 376; State v. Corrivau, 93 Minn. 38, 100 N. W. 638; Chowning v. State, 91 Ark. 503, 121 S. W. 735, 18 Ann. Cas. 529.

[75] Lyle v. State, 31 Tex. Cr. R. 103, 19 S. W. 904.

the time of the act may be shown to disapprove an actual intent.[76]

(3) Under statutory enactments in some jurisdictions, notably in Texas, it is held that temporary insanity brought about by the use of intoxicants may be shown, in order to show a state of mind such as would justify a mitigation of the penalty imposed of the crime in question.[77] This is placed on the grounds that one who intentionally and willfully commits a crime should be more severely punished than one who does so through the promptings of an intoxicated mind, even though the fact that it was brought on by his own act would prevent its being an entire excuse. But where the intoxicants are taken with a view of stimulating the criminal purpose, it is obvious that evidence of intoxication resulting therefrom cannot be shown in mitigation of the offense.[78]

§ 62. Grounds for mitigation of punishment

There has been a decided tendency in some jurisdictions to qualify the rule which refuses to allow intoxication to be shown in excuse or mitigation of punishment for crime, where such intoxication is joined with a provocation for such crime, as, for example, where an intoxicated person is provoked to anger and commits murder. In such case, it is argued that the fact that a drunken man is more easily provoked to anger than a sober one may be taken into consideration in mitigation of the punishment.[79] But the rule has not met with general approval and is generally rejected.[80]

[76] Malone v. State, 49 Ga. 210; Rex v. Thomas, 7 Car. & P. 817; Wilking v. Com. (Ky.) Sept. 13, 1888; Booher v. State, 156 Ind. 440, 60 N. E. 156, 54 L. R. A. 393.

[77] Stoudenmire v. State, 58 Tex. Cr. R. 258, 125 S. W. 399.

[78] Aszman v. State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; Marshall v. Com., 141 Ky. 222, 132 S. W. 139, 31 L. R. A. (N. S.) 379; Lyle v. State, 31 Tex. Cr. R. 103, 19 S. W. 904, and cases cited; State v. Dillard, 59 W. Va. 197, 53 S. E. 117.

[79] Golden v. State, 25 Ga. 527; State v. Davis, Houst. Cr. Cas. (Del.) 13; State v. Johnson, 41 Conn. 587.

[80] Springfield v. State, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85; State v. Davis, 52 W. Va. 244, 43 S. E. 99; State v. Mullen, 14 La. Ann. 570; Pirtle v. State, 9 Humph. (Tenn.) 663.

§ 63. Insanity produced by intoxication in general

The rule which refuses to recognize intoxication, or temporary insanity resulting from it, as a defense to crime or tortious acts, does not extend further, for it is well recognized that, where the intoxication has resulted in settled insanity of a more or less permanent nature, it will excuse crime committed under its promptings.[81] It has therefore become important to know just where temporary insanity, as the term is here used, resulting from the recent voluntary use of ardent spirits, ceases, and settled alcoholic insanity, growing out of it, begins.

§ 64. Extent of effect on mind

Some of the earlier decisions seem to hold that, where the intoxication affects the understanding of the inebriate to that extent that he can no longer entertain a criminal motive, it has become legal insanity, and may be pleaded as a defense to crime.[82] But a different rule is now recognized by the courts of Texas and by those of the American states at large. It is recognized: (1) That a species of temporary insanity may be produced by long and continued use of intoxicants, in which state the person's mind is temporarily so affected that it is incapable of knowing the right and wrong of his acts. This condition of the mind is the direct result of the voluntary act of the defendant, in becoming intoxicated, and will not excuse crime, except to reduce the degree of murder and show the lack of a necessary intent, as we have seen supra. (2) The continued use of intoxicants may result in a breaking down of the brain and nerve cells, so as to bring about a derangement of the mind, which continues

[81] Evers v. State, 31 Tex. Cr. R. 319, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; United States v. Drew, Fed. Cas. No. 14,993, 5 Mason, 28; Maconnehey v. State, 5 Ohio St. 77; Terrill v. State, 74 Wis. 278, 42 N. W. 243.

[82] Whart. Cr. Law, § 49; Rex v. Monkhouse, 4 Cox, Cr. Cas. 55; Gunter v. State, 83 Ala. 96, 3 So. 600; Director of Public Prosecutions v. Beard [1920] App. Cas. 479, 12 A. L. R. 846; Duke v. State, 61 Tex. Cr. R. 441, 134 S. W. 705.

after the mere temporary effect of the ardent spirits has passed off. This condition is variously known as *delirium tremens, dipsomania, alcoholic dementia,* and *mania a potu.* Control over the derangement has at this point passed beyond the volition of the person affected, and has become an involuntary result of the intemperate act.[83] This is what is sometimes known as *settled* alcoholic insanity, and it is well recognized as a form of legal insanity, in the sense that it will excuse criminal acts committed under its influence.[84]

§ 65. Involuntary intoxication

It has been suggested in this connection that, where the intoxication has not been voluntary on the part of the accused, a different rule should be applied. The reason advanced is that the grounds for the rule denying intoxication as a defense for crime, viz., that as a matter of public policy no person should be allowed to find excuse for crime in a state which he has voluntarily brought upon himself, has failed when the intoxication has ceased to be voluntary, and the rule itself should fall with it.[85] The practical application of the exception is doubtful, as it would be very difficult to conceive of circumstances where persons were forced to take intoxicants against their will. We do not think the mere lack of an intention to become intoxicated would satisfy the conditions of the exception, so long as the user were conscious he was imbibing an intoxicant. A sane person is ordinarily charged with the consequences of his act, and the

83 Cheadle v. State, 11 Okl. Cr. 566, 149 P. 919, L. R. A. 1915E, 1031; Evers v. State, 31 Tex. Cr. R. 319, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; Martin v. State, 100 Ark. 189, 139 S. W. 1123; O'Grady v. State, 36 Neb. 320, 54 N. W. 556; Terrill v. State, 74 Wis. 278, 42 N. W. 243; State v. Thompson, 12 Nev. 140; Director of Public Prosecutions v. Beard [1920] App. Cas. 479, 12 A. L. R. 846.

84 Duke v. State, 61 Tex. Cr. R. 441, 134 S. W. 705; Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811; Cheadle v. State, 11 Okl. Cr. 566, 149 P. 919, L. R. A. 1915E, 1031.

85 Carter v. State, 12 Tex. 500, 62 Am. Dec. 539.

natural effect of intoxicants is to intoxicate. However, where through the inexperience of the user, through accident, or through deception practiced upon him, it can be shown that the intoxication was actually involuntary, there is authority for the statement above to the effect that such intoxication may be held to excuse, or at least to mitigate, a crime committed under its promptings.[86]

§ 66. Question of fact

Following the general rule that, whether derangement of a person's mind is such as will bring him within the definition of a non compos is a question of fact, the question of whether or not intoxication in a particular case has actually developed into dipsomania, etc., and whether or not the acts of the person in question are the result thereof, is a question of fact, to be submitted to the jury under proper instructions from the court.[87]

§ 67. Intoxication by drugs

The rule we have discussed supra, as applying to intoxication from liquor, has not been applied with the same effect to criminal acts brought about by reason destroying drugs, or by intoxicating liquors combined with such drugs, where the latter contributed to the temporary loss of reason. On the contrary, insanity or temporary mental derangement brought about by the recent voluntary use of morphine, cocaine, or other narcotics, or by the use of such drugs and intoxicants together, will be treated as legal insanity and will excuse crime committed during such derangement.[88] The reason for the different rules applied by the courts to these different forms of artificial mental derangement is not very clear. In the states where intoxication is expressly excluded as a defense to crime by local statutes or

[86] Curry v. Com., 2 Bush (Ky.) 67.

[87] Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533.

[88] Edwards v. State, 38 Tex. Cr. R. 391, 43 S. W. 112, 39 L. R. A. 262; Phillips v. State, 50 Tex. Cr. R. 481, 98 S. W. 868; Terrill v. State, 74 Wis. 278, 42 N. W. 243; Roberts v. People, 19 Mich. 401.

codes, the reason given is that, under the strict construction accorded penal statutes, such statutes should not be extended so as to include temporary mental derangement produced by drugs, but must be confined to that produced by intoxicating liquors under the express terms of such statute.[89] We would suggest that a reason might also be found in the different effect of the intoxicant and narcotic upon the user. In case of intoxicants, the effect is generally temporary. Its use is seldom constant; and, even where one is a "steady drinker," the effect is, as a rule, only periodic and intermitting. On the other hand, the intemperate use of drugs fastens itself upon the user until it becomes an unremitting habit; and the effect upon the mind is equally constant. It is, therefore, a more settled perversion of the mind than in the case of intoxicants. Moreover, it is not so subject to use as a premeditated shield for crime as in case of intoxicants, as the drug habit is not formed in a day, and is not, like intoxication, entered upon and then thrown aside at will. It is probably owing to this terrible and settled effect of the drug upon the mind that the courts have placed the "dope fiend" in a class with the dipsomaniac, whose intemperate acts have crystallized into settled alcoholic insanity. Since the above rule holds good where the drug is self-administered, a fortiori, the same will be true where it is administered by another, and especially if without the knowledge or consent of the person to whom it is administered.[90]

§ 68. Moral mania (insanity) generally

In general, moral insanity is a loss of control over the passions and propensities due to weakening of the moral senses. The unsettling of the moral senses may and may not extend to the mental faculties. The questions respecting this class of insanity usually arise in criminal law, and we shall consider it largely from that standpoint.

89 Burton v. State, 46 Tex. Cr. R. 493, 81 S. W. 742; Edwards v. State (Tex. Cr. App., on rehearing) 54 S. W. 589.

90 Pribble v. People, 49 Colo. 210, 112 P. 220.

§ 69. Kinds of moral insanity in general

Moral insanity may be divided into two classes: First, moral insanity proper, or that having to do with the moral side only of man's nature; second, moral-intellectual insanity, or those moral perversions which begin in the moral side of man's nature, but extend to the intellect as well.

§ 70. Moral mania (insanity) proper

Moral insanity proper is a morbid perversion of the moral feelings, affections, and inclinations without an accompanying perversion of the mentality.[91] It would seem to be the result of the decay of the moral side of man's nature, and to manifest itself in acts revolting to the right and higher moral sense. A person so affected seems to have power to comprehend the nature of his act and its probable effect on the rights of others, but he has not will power sufficient to resist the impulse to do the act, nor conscience nor moral feeling prompting him to resist it.[92]

§ 71. Characteristics

We may better understand this subject of moral and moral-intellectual perversion, if we keep in mind that there are, properly speaking, two restraining influences that tend to keep man within the law in his dealings with his fellows. There is, first, the moral side of man's nature, having its seat in the conscience and deriving its restraining force from the inherent sense of right naturally implanted in the breast and fostered or stifled by

[91] 2 Bouv. Law Dict. p. 438; Tayl. Med. Jur. p. 780; Chap. Med. Jur. p. 224; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

[92] Banks v. Com., 145 Ky. 800, 141 S. W. 380; Sartin v. State, 51 Tex. Cr. R. 571, 103 S. W. 875; Guiteau's Case, 10 F. 161; United States v. Guiteau, 1 Mackey (12 D. C.) 498, 47 Am. Rep. 247; Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405; Mackin v. State, 59 N. J. Law, 495, 36 A. 1040; Bothwell v. State, 71 Neb. 747, 99 N. W. 669.

environments, association, and education. In such case, conscience lights the way, and the will forces man to follow in the path that conscience instinctively shows to be right. Depraved surroundings or instincts inherited from criminal ancestors may distort and silence the voice of conscience in the same way that education and refined surroundings may render it more acute. For example, children born of depraved parents and reared in the slums, where they are constantly brought in contact with robbery and theft, early lose sight of the sacred rights of the property of others, and the white slaver and keeper of the brothel, by long plying their trade, become dead, as it were, to the shame of their trade and the misery of their unfortunate victims. Again, the same conditions may serve to break down or weaken the will power, till the impulse to do wrong can no longer be resisted. As an illustration, we may mention the moral degenerate, who has no power to hold his passions in leash; his self-control having been broken down along with the decay of his moral nature. Thus it is that man, who, in his perfect state, needs no law save that implanted in his own breast by his Maker, becomes the moral pervert that only the fear of the penalty of man-made laws restrains from the transgression of every rule of action and good morals.

§ 72. As defense to crime

There is, secondly, the restraining influence of the law. The only protection society has against some of its members is through laws made by itself, denouncing certain acts as wrong, and prescribing punishment for their commission. Though the moral senses may be deadened or perverted, yet perception may be, and usually is, fully alive and clear, and such a person is fully able to understand that the contemplated act is prohibited and its commission punishable. Hence has arisen the rule that, where a person is able to understand the nature of an act and to appreciate its probable consequences, he will be held liable for its commission, or, as it is also stated, where one is able to distinguish between the right and wrong of his acts, he is pun-

ishable for the wrong committed, without regard to how strong the impulse to do the prohibited act, or how weak his will to resist the force of the impulse to so act, except in those jurisdictions where irresistible impulse may be pleaded as a defense to crime.

§ 73. Moral and legal aspects

Perhaps we can better illustrate this by saying that man has two personalities, one moral and the other physical. The moral man is governed by the rules of action prescribed by the Creator and engraven on the conscience. Their enforcement is left to the will of man himself, and with reference to it the rule of primitive society holds, and every man is "a law unto himself." The physical man, on the other hand, is governed by the rules of action drawn up by society and made known to the man through his physical perceptive powers, or intelligence. One may sin morally without criminal liability, as in case of a lie not told under oath or other legal sanction. Conversely, one may transgress the law without any great moral turpitude; it is merely mal prohibita. It is generally admitted now that a person who has a low moral development is held less guilty in transgressing moral laws than one more highly developed along this line. For instance, a breach of the marriage vows will be passed over in the untutored savage, where it would render a man in higher circles of society amenable to severe censure. But this is confined strictly to the realm of the "moral man." In the eyes of the law, theft by an ignorant negro of a watermelon is as culpable as the theft of money by an educated banker. A denizen of "Little Italy" may not be liable to any grave moral blame when he sees some bright "gew-gaw," which he wants so much, and which, because of the fact that he has been led by his associations and training to so lightly regard the property rights of others that he cannot resist the temptations he takes; but if he has sufficient mind to understand that the property belongs to another, and that the law forbids him taking it without the owner's consent, he is nevertheless guilty of theft.

§ 74. Bases for rejection as defense

As can be readily seen, society and her courts cannot recognize such a state of mind as any excuse for acts in violation of criminal law, as in doing so it would be allowing the low, the vicious, and the moral degenerate to plead their condition in excuse of their acts. There would be no protection against the most dangerous class of criminals; and a premium would be placed upon moral degeneracy.[93] For this reason, the courts have not favored it in any of the many forms in which it has been pleaded.

§ 75. Irresistible impulse, in general

The principal form that moral insanity proper has taken in its discussion by the courts is that of what is known as irresistible impulse. This is assumed to be a condition where the person affected has no will to resist the act of which he is accused.[94] The argument advanced in support of the doctrine of irresistible impulse as an excuse for crime is that, if the person affected was moved by an irresistible impulse, which he had no will or strength of mind sufficient to combat, he would be acting under coercion, and would be irresponsible for the acts so committed; and in such case it would be highly unjust for such a person to be punished for the commission of an act he is powerless to resist.[95] For

[93] Sartin v. State, 51 Tex. Cr. R. 571, 103 S. W. 875; Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; United States v. Holmes, Fed. Cas. No. 15,382; Bothwell v. State, 71 Neb. 747, 99 N. W. 669; Goodwin v. State, 96 Ind. 550; People v. Trebilcox, 149 Cal. 307, 86 P. 684; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731. See 27 L. R. A. (N. S.) 89, 90.

[94] 1 Bouv. Law Dict. p. 1054; 1 Whart. Cr. Law, §§ 145–574; Steph. Cr. Law, 91; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

[95] Looney v. State, 10 Tex. App. 520, 38 Am. Rep. 646; State v. Peel, 23 Mont. 358, 59 P. 169, 75 Am. St. Rep. 529; McCarty v. Com., 114 Ky. 620, 71 S. W. 656; Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Flanagan v. State, 103 Ga. 619, 30 S. E. 550; Lowe v. State, 44 Tex. Cr. R. 224, 70 S. W. 206; Adair v. State, 6 Okl. Cr. 284, 118 P. 416, 44 L. R. A. (N. S.) 119.

a time it was urged that this doctrine applied to any form for impulse whether it grew out of mental or moral insanity, but the latter view has now been repudiated in practically every state of the Union and in England as well.[96]

§ 76. Distinguished from emotional insanity

The reason for the doctrine of irresistible impulse, being confused with impulses growing out of moral insanity, will likely be found in the general language and expressions used by some of the authorities and in the failure of the courts to draw a clear distinction between *emotional impulses,* sometimes spoken of as "emotional insanity," and *irresistible impulse,* the unintentional failure on their part to distinguish between acts prompted by the emotions, which might for the time override the will and self-control and acts prompted by a mind weakened by disease, and which was unable to maintain its sway over the body.[97] A typical example of this is seen in the opinion of the early Pennsylvania decision of Com. v. Mosler, where the court says: "But there is a moral insanity, * * * consisting of an irresistible inclination to kill or to commit some other particular offense. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, it is incapable of resistance." [98] A careful consideration of the authorities will, we think, make it clear that the key to the matter will be found in the query as to whether or not the act in question is the outgrowth of the emotions or of a weakened intellect. No matter how strong the impulse to act, or how ungovernable the passions or desires, they can never be the sole impelling force of an irresistible impulse, as that term is recognized in law.

[96] See note 95, and ante, § 74.
[97] Mutual Life Ins. Co. v. Terry, 15 Wall. 580, 21 L. Ed. 241.
[98] 4 Pa. 267.

§ 77. Conflict of authority

In general, the decision upon the subject of irresistible impulse as a defense for crime, fall into three groups, viz.:

§ 78. Authorities giving general recognition

The first group comprises those decisions which recognize the doctrine in general terms, without limiting its effect. No distinction, generally, is drawn between emotional and intellectual impulses; and it is merely recognized as a general rule that persons are not amenable to punishment for crime, where such alleged crime is committed under the influence of an impulse which they are unable to resist.[99] Most of the cases in this group are old and their force is doubtful.

§ 79. Authorities giving limited recognition

The second group of cases lays down the rule that an act committed under an irresistible impulse will only excuse crime, where such impulse grows out of a diseased mind.[1] "'Irresistible impulse' implies knowledge of right and wrong in some degree, but coupled with it, the absence of power, resulting from a disordered mind, to sufficiently resist the impulse to do the criminal act."[2] This rule seems, from its history, to have been evolved out of the above, but the cases here grouped repudiate express-

[99] Commonwealth v. Mosler, 4 Pa. 267; Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669; Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461; Fouts v. State, 4 G. Greene (Iowa) 500; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Goodwin v. State, 96 Ind. 550; Sawyer v. State, 35 Ind. 80; Fisher v. People, 23 Ill. 283; McNaughten's Case, 10 Clark & F. 200; State v. McCullough, 114 Iowa, 532, 87 N. W. 503, 55 L. R. A. 378, 89 Am. St. Rep. 382.

[1] Com. v. Wireback, 190 Pa. 138, 42 A. 542, 70 Am. St. Rep. 625; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231; Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Green v. State, 64 Ark. 523, 43 S. W. 973; Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461; State v. Peel, 23 Mont. 358, 59 P. 169, 75 Am. St. Rep. 529.

[2] State v. Peel, 23 Mont. 358, 59 P. 169, 75 Am. St. Rep. 529.

ly any tendency of the first group to recognize an emotional impulse unaccompanied by a subversion of the mental faculties. This may be said to be the general rule in those jurisdictions which recognize the doctrine of irresistible impulse, and forms an exception to the so-called "right and wrong" test, which prevails in practically every state in connection with the measure of mental capacity to commit crime.

§ 80. Authorities applying right and wrong test

The last group, while recognizing the term *irresistible impulse*, yet adheres to the right and wrong test in measuring the mental capacity of the subject. These cases insist that the criminal act must not only be the result of an irresistible impulse induced by a diseased mind, but that the person in question must have been so deranged that he was incapable of understanding that the act was wrong. The idea seems to be that, no matter what the cause of the impulse, so long as the perpetrator is capable of understanding and appreciating that the act in question is in violation of law he is accountable.[3] The rule adopted by these cases seems to be a revolt from the liberal interpretation sometimes placed upon the rule enunciated by the first group we have considered supra, and from the idea that an impulse, probably itself the outgrowth of a criminal career, should be pleaded in extenuation of crime. The result is, as frequently happens in such cases, that the courts have been carried beyond the range of the idea originally aimed at, and the basic idea of "irresistible impulse" has to all practical purposes been lost sight of.

[3] Knights v. State, 58 Neb. 225, 78 N. W. 508, 76 Am. St. Rep. 78; State v. Knight, 95 Me. 467, 50 A. 276, 55 L. R. A. 373; People v. Hubert, 119 Cal. 216, 51 P. 329, 63 Am. St. Rep. 72; Genz v. State, 59 N. J. Law, 488, 37 A. 69, 59 Am. St. Rep. 619; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

§ 81. Uncontrollable and irresistible impulses distinguished

"Irresistible impulse" and "uncontrollable impulse" have often been confused, and this confusion of the meaning of the two terms has led to much of the confusion in the application of the rule of *irresistible impulse*. Control means the appreciation of the general principles of conduct and conforming the conduct thereto as to the acts in question. The passions may override the power to so conform the acts, notwithstanding the power of appreciation of the nonconformity of the same, and we have uncontrollable impulses. But where, through disease of the mind or affection of the intellect, this appreciation of principles of conduct and motive are lost or weakened, the power of resistance is lost or weakened, and the urge to act may become an "irresistible impulse" in this sense.[4]

§ 82. Moral-intellectual mania, in general

Under the head of Moral-Intellectual Insanity, we will consider those forms of moral insanity, where the moral perversions are accompanied by intellectual derangement. One phase of this has already been considered under the head of Irresistible Impulse, supra. As pointed out there, to be recognized as a defense for crime, moral insanity must extend beyond the mere perversion of the moral nature, and must so far affect the mind of the subject as to unseat the reason with reference to the act in question.[5] It usually manifests itself in distinct delusions,

[4] State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; State v. Knight, 95 Me. 467, 50 A. 276, 55 L. R. A. 373; State v. Riddle, 245 Mo. 451, 150 S. W. 1044, 43 L. R. A. (N. S.) 150, Ann. Cas. 1914A, 884; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Smith v. State, 95 Miss. 786, 49 So. 945, 27 L. R. A. (N. S.) 461, Ann. Cas. 1912A, 23; People v. Hubert, 119 Cal. 216, 51 P. 329, 63 Am. St. Rep. 72; State v. Mewhinney, 43 Utah, 135, 134 P. 632, L. R. A. 1916D, 590, Ann. Cas. 1916C, 537; Guiteau's Case, 10 F. 161.

[5] Spencer v. State, 69 Md. 28, 13 A. 814; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; State v. Leehman, 2 S. D.

and seldom amounts to total insanity. Indeed, it seems rather to be a perversion of one side of the moral nature, which extends to and clouds the intellect, with reference to some subject upon which the mind is allowed to dwell. This dwelling of the mind upon the subject becomes morbid till it is unable to act normally with reference to it. This form of mental derangement usually takes one of the forms of mania, such as kleptomania, pyromania, fanatica mania, erotomania, homicidal mania, etc. We will consider these in turn.

§ 83. Kleptomania

Kleptomania is a form of moral intellectual mania, manifesting itself in a morbid propensity to steal.[6] It is also defined as an irresistible desire to steal.[7] It seems to be a weakening of the mental and moral recognition of the property rights of others, so that such person is no longer able to recognize and respect such rights. Along with this is a morbid desire to take into possession and frequently to conceal any article that may attract his attention. The affection is well recognized as a form of legal insanity.[8]

§ 84. Characteristics

A point that is as yet unsettled is whether or not it is necessary for this affection to result from mental weakness before it will be recognized by the courts. In other words, will a mere weakening of the will power be sufficient, or must there be a weakening of the reasoning or perceptive powers, so that such person

171, 49 N. W. 3; In re Forman's Will, 54 Barb. (N. Y.) 274; State v. Knight, 95 Me. 467, 50 A. 276, 55 L. R. A. 373. See 76 Am. St. Rep. 90.

[6] Tayl. Med. Jur. (Bell's Ed.) 776; 1 Clev. Insan. p. 177.

[7] State v. McCullough, 114 Iowa, 532, 87 N. W. 503, 55 L. R. A. 378, 89 Am. St. Rep. 382; Lowe v. State, 44 Tex. Cr. R. 224, 70 S. W. 206; State v. Riddle, 245 Mo. 451, 150 S. W. 1044, 43 L. R. A. (N. S.) 150, Ann. Cas. 1914A, 884.

[8] State v. McCullough, 114 Iowa, 532, 87 N. W. 503, 55 L. R. A. 378, 89 Am. St. Rep. 382; Looney v. State, 10 Tex. App. 520, 38 Am. Rep. 646; State v. Reidell, 9 Houst. (Del.) 470, 14 A. 550; Com. v. Fritch, 9 Pa. Co. Ct. R. 164.

cannot understand the effect of or perceive the wrongfulness of his acts. There is reputable authority which seems to hold that a mere weakening of the will is sufficient. In the case of State v. McCullough, it is thus stated by Waterman, J.: "It is, as we understand it, a weakening of the will power to such an extent as to leave the affected one powerless to control his impulse to appropriate the personal property of others, without regard to whether such impulse is inspired by avarice, greed, or idle fancy.[9] As opposed to this, the Texas Court of Criminal Appeals, speaking through Henderson, J., in the case of Lowe v. State,[10] decided the next year after the Lowe Case we have just quoted, expressly repudiated the idea that kleptomania of the order that was merely an uncontrollable impulse to steal could be recognized by law, and sought to apply to it the right and wrong test. The court in this last case bases its opinion upon the decisions in the "irresistible impulse" cases, holding that, since the courts had refused in that class of cases to recognize generally the irresistible impulse, where such impulse was not the result of a disordered mind, the courts could not recognize such doctrine in the special instance of irresistible impulse as applied to theft only. However, the general rule likely follows the principles governing *irresistible impulse* noted above; i. e., kleptomania will be recognized as a defense to crime only where the impulse to steal grows out of a diseased mind, and not from moral perversion alone.[11]

[9] 114 Iowa, 532, 87 N. W. 503, 55 L. R. A. 378, 89 Am. St. Rep. 382; 3 Bouv. Law Dict. p. 2774.

[10] 44 Tex. Cr. R. 224, 70 S. W. 206.

[11] State v. Riddle, 245 Mo. 451, 150 S. W. 1044, 43 L. R. A. (N. S.) 150, Ann. Cas. 1914A, 884.

§ 85. Pyromania

This form of intellectual mania consists in a morbid propensity to set fire and destroy some object.[12] A celebrated case is that of Jonathan Martin, who believed himself commissioned by God to burn the Cathedral at York.[13] Numerous other cases are found in the authorities.[14] It seems to appear in two distinct forms. The first is where, through the affection of the mind by some form of mania, the person is led to believe that it is his duty to commit the act of incendiarism. An example of this is seen in the case given above. Where the *delusion* which leads to this act is such as to excuse under the condition we have already discussed under that head, and the subject is unable to appreciate that it would be wrong to commit the act, of course this act will be excused as a mere result of the madness. The second class is that which is marked by a mere morbid propensity to set fire,[15] and is really a form of moral insanity as induced rather by a weakening of the moral will control, than a weakening or perversion of the intelligence, and, where there is no mental derangement shown, it would seem that this would fall under the general rules governing irresistible impulse,[16] and could not be pleaded as a defense to the act.

§ 86. Erotomania, in general

Erotomania, or erotic mania, is a morbid activity of the sexual propensities.[17] From a medical standpoint, "it is a disease of morbid affection of the mind, which fills it with crowds of voluptuous images, and hurries its victims to great licentiousness." [18] From the strict standpoint of the law courts, it is con-

[12] 3 Bouv. Law Dict. p. 2774; Black, Law Dict., tit. "Pyromania."

[13] Tayl. Med. Jur. 595; Whart. & S. Med. Jur. § 606.

[14] Reg. v. White, Wilts Summer Ass. 1845; James Gibbon's Case, Carmack's Edinburg Jur. (Fed. 1845) p. 141.

[15] 16 Am. & Eng. Enc. of Law, 564.

[16] See supra, § 75 et seq.

[17] 1 Bouv. Law Dict. p. 687.

[18] Koft-Ebing, Psycopathia Sexualis (Chaddock's Ed.).

sidered a form of intellectual mania, manifesting itself in sexual perversion.

§ 87. Kinds of erotomania

Strictly speaking, it is divided into satyriasis, or the form found in the male sex, and nymphomania, or the form found in the female sex.[19] Each of these classes may take either of two forms. It may be characterized by a morbid, uncontrollable, and unreasoning desire to engage in sexual intercourse, or the mind may be filled with morbid fancies that some person is trying to have, or has actually had intercourse with the person affected.[20]

§ 88. Satyriasis

In the case of the male sex, the affection usually takes the first form mentioned; that is, a morbid desire for sexual intercourse. The causes are varied. It may occur from some disease that has stimulated the sexual desires, or it may occur from the moral depravity of the person's ancestors which has been in turn transmitted to him, and which has broken down the moral control over the passions. If it has gone so far that it has unseated the reason to the extent that such person is unable to understand and appreciate the consequences of his act, or to distinguish between right and wrong with respect to such acts, such affection will be regarded as legal insanity such as will excuse acts done under its promptings.[21] However, on account of moral perversion, weakening of the will, or uncontrollable passion will excuse, unless it overrides the reasoning powers and destroys the person's freedom of action.[22]

[19] Chap. Med. Jur. (3d Ed.) 222.

[20] Kirchhoff's Hand Book of Insanity, p. 97.

[21] Hurst v. State, 40 Tex. Cr. R. 378, 46 S. W. 635.

[22] Hurst v. State, 40 Tex. Cr. R. 378, 50 S. W. 719; Harrison v. State, 44 Tex. Cr. R. 164, 69 S. W. 500.

§ 89. Nymphomania

Nymphomania, or the manifestation of such affection in the female, usually takes the second form mentioned in section 87, supra; that is, it induces lascivious fancies of sexual intercourse attempted to be accomplished upon such person. Like the corresponding affection in the male, this condition is usually the result of disease of the offspring of low moral conditions of the parents or ancestors. Immediate results are that the mind dwells upon lascivious ideas till it is persuaded that the acts contemplated in the mind have been accomplished as a fact. If this condition proceeds to such an extent that it clouds the reason and induces fancies, having no existence in fact, that such person is threatened, or has been subject to, copulation by a member of the opposite sex, it will amount to legal insanity.[23] But no amount of inflamed passions or moral degeneracy alone will be recognized. There must not only be a perversion of the moral propensities, but a subversion of the mind as well.[24]

§ 90. Erotomania artificially induced

A condition very closely approaching erotomania is very frequently artificially produced. One of the instances of this is where the passions have been inflamed with drink. As we have seen under the head of intoxication, this will not be taken as an excuse for crime, unless the intoxication has been so protracted that it has become temporary insanity.

But by far the most frequent example is found in the case of the action of drugs upon women. It is usually brought to the attention of the court in one of two forms:

§ 91. Produced by anæsthetics

The first of these are where fancies are induced into the mind of a woman under the influence of drugs that they are subjected to sexual intercourse. It often occurs where such women are

[23] Jenkins v. State, 60 Tex. Cr. R. 236, 131 S. W. 542.
[24] Harrison v. State, 44 Tex. Cr. R. 164, 69 S. W. 500.

under the influence of ether or chloroform during the operations. The anæsthetic stimulates the sexual organs, and the woman imagines she is having intercourse with her husband, lover, or even with the surgeon or dentist himself. Numerous cases are on record where the surgeons or dentists have been accused by patients of rape alleged to have been committed upon them while under the influence of an anæsthetic, and where conditions made it simply impossible for the crime to have been committed.[25]

§ 92. Produced by drugs

The second of these is where a form of uncontrollable passion is induced by the intentional administration of drugs. In this case, it is not necessary that the mentality be clouded, but it is sufficient if an unnatural and irresistible sexual passion be aroused, in order to charge the administrator of the action or excuse the victim. This has appeared in the courts in criminal matters growing out of attempts of men to overcome the virtue of women by giving them such drugs, and so put them into a condition where their will can be the more easily broken down. The matter is founded upon local statutes, and is not a rule of general judicial recognition.[26]

§ 93. Fanatica mania

Fanatica mania, or religious insanity, is a form of mania characterized by a morbid state of religious thought, of fancies,[27] sometimes amounting to a frenzy.[28] It does not, however, mean merely unusual and revolutionary ideas on religious subjects, as the world has grown in breadth of thought since the laws of England attempted to place in this class

[25] Chap. Med. Jur. (3d Ed.) p. 138; Witthaus & Becker, Med. Jur. and Tox. pp. 450–452.

[26] Pen. Code Tex. 1911, art. 636; Baldridge v. State, 45 Tex. Cr. R. 193, 74 S. W. 916.

[27] 4 Words and Phrases, p. 3644; Ekin's Heirs v. McCracken, 11 Phila. (Pa.) 534.

[28] Weir's Will, 9 Dana (Ky.) 434. See Williams' Ex'r v. Williams, 90 Ky. 28, 13 S. W. 250.

"Quakers, Antibaptists and all other sectaries and factious dessenters from the Church of England." [29] As we have seen supra, under the head of Delusions,[30] mere unusual ideas on abstract subjects, such as religion, will not of itself be considered legal insanity, and one may believe in Spiritualism,[31] and the numerous other revolutionary ideas of the day, and may even credit the doctrine of the transmigration of the human soul into brutes,[32] without being considered legally demented. But this has its limits. While one may think as he chooses along these lines, he must retain his equilibrium mentally with reference to such ideas. A mind cannot be said to be demented because of abstract ideas with which we cannot agree, but such mind does become so where it attempts to follow the teachings of such theories and doctrines in contravention of the established law and the recognized civil rights of his fellows, under the mistaken fallacy that his religious principles require it of him.[33] Here the judgment is affected, and the power of the mind to properly associate ideas is impaired. The mind has become so imbued with the ideas and principles of such religion that the devotee is constrained to follow it, in disregard of all restrictions of the law of the land. In brief, such a one is not capable of intelligently understanding that it is right to follow the mandate of the law, whatever one's private opinions may be on the subject, and to that extent is legally insane. Whether it would be a defense to crime would depend upon how far it affected one's ability to distinguish between right and wrong in such matters.

[29] Stat. 13, Car. II, c. 6.

[30] See supra, § 34 et seq.

[31] Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422; Buchanan v. Pierie, 205 Pa. 123, 54 A. 583, 97 Am. St. Rep. 725; Burchill v. Hermsmeyer (Tex. Civ. App.) 230 S. W. 809; Owen v. Crumbaugh, 228 Ill. 380, 81 N. E. 1044, 119 Am. St. Rep. 442, 10 Ann. Cas. 606.

[32] Wait v. Westfall, 161 Ind. 648, 68 N. E. 271.

[33] Bonard's Will (N. Y.) 16 Abb. Prac. (N. S.) 128, 185; Rubright's Case, 3 Pittsb. R. (Pa.) 299, 303.

§ 94. Frenzy

Another condition under which this class of mania, in common with another form of monomania, will be considered as legal insanity, is where the delusion or mania amounts to such a frenzy that, though it does not bear directly on the subject-matter of the acts in question, yet it so far disorganizes the mind and reason generally as to materially interfere with a rational exercise of the reason and judgment.[34] This is merely a special instance of the class already treated under the head of Delusion.[35]

§ 95. Homicidal mania

Homicidal mania has already been spoken of supra as a form of monomania.[36] It is considered as being very closely associated with moral insanity, as it often springs from some moral weakness or perversion. Masturbation and other forms of moral perversion are very often its procuring causes.[37] The term itself is somewhat vague, and it is used to cover a number of forms of mental derangement, in which there is an inclination to take human life. For convenience in treating it, we will consider it as manifesting itself under two forms.

§ 96. Characteristics

One of the forms in which homicidal mania appears is that spoken of by the courts as an "irresistible inclination to kill." [38] This form of mania approaches too nearly to the form of mental

[34] Williams' Ex'r v. Williams, 90 Ky. 28, 13 S. W. 250; Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 488; Com. v. Sayre, 5 Wkly. Notes Cas. (Pa.) 424, 425; 1 Beck, Med. Jur. (10th Ed.) 723; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; Com. v. Freth, 3 Phila. (Pa.) 105; Ray on Insanity (3d Ed.) §§ 17, 18, 22.

[35] See supra, § 34 et seq.

[36] See supra, § 44.

[37] Hurst v. State, 40 Tex. Cr. R. 378, 46 S. W. 635, 50 S. W. 719; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Com. v. Mosler, 4 Pa. (4 Barr) 264.

[38] See authorities under § 94, note 34.

derangement known as "transitory frenzy," [39] considered supra,[40] and has even been confused with it by some authorities. It also smacks very much of the principles that give rise to the doctrine of "emotional impulse," sometimes confused with irresistible impulse, and for that reason the tendency of modern decisions has been to restrict its recognition by the courts to instances where the act in question grows out of a weakened or diseased mind.[41] For example, it has been held by the Texas courts that, where homicidal acts grow out of an uncontrollable and irresistible impulse to kill, which, because of the unsoundness of the mind, the perpetrator has not sufficient reason, judgment, and will power to resist, such person will be held to be legally insane.[42]

§ 97. As defense to crime

The form of homicidal mania that appears most often in court as a defense to crime is that in which the person affected is under the delusion that some person or persons are trying to injure him or his family. It takes a variety of forms. In some cases such person imagines that another is plotting against him; in other cases it is a mob that is pursuing him; and yet in other cases he thinks persons are trying to kill his family, or are attempting to ruin or carry off his daughter or other female relations. The same affection is usually known to the medical world as Paranoia. Its usual effect is to destroy the power to rightly

[39] Com. v. Renzo, 216 Pa. 147, 65 A. 30.

[40] See supra, § 50.

[41] Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; Com. v. Mosler, 4 Pa. 264; State v. Pagels, 92 Mo. 300, 4 S. W. 931; State v. Lauth, 46 Or. 342, 80 P. 660, 114 Am. St. Rep. 873; Smith v. State, 95 Miss. 786, 49 So. 945, 27 L. R. A. (N. S.) 461, Ann. Cas. 1912A, 23; State v. Cloninger, 149 N. C. 567, 63 S. E. 154; Morris v. Territory, 1 Okl. Cr. 617, 99 P. 760, 101 P. 111.

[42] Cannon v. State, 41 Tex. Cr. R. 467, 56 S. W. 361; Smith v. State, 95 Miss. 786, 49 So. 945, 27 L. R. A. (N. S.) 461, Ann. Cas. 1912A, 23; Armstrong v. State, 30 Fla. 170, 11 So. 618, 17 L. R. A. 484.

associate ideas, and to unbalance the judgment. Where it can be shown that the delusion is so dominating the person's mind as to disturb or distort the judgment with reference to the nature and consequence of his acts, and to render him incapable of distinguishing the right from wrong, he will be deemed insane within the scope of such delusions.[43]

§ 98. Suicidal mania

Closely associated with homicidal mania, or a propensity to kill another, is suicidal mania, or a propensity for self-destruction. It usually arises from the same cause, and frequently follows periods of profound melancholy. The mind seems to dwell upon real or fancied troubles, and on self-destruction as an escape from them, till it becomes unbalanced and is no longer able to act rationally with reference to the matter. It is recognized by the courts; but its only practical application is with reference to insurance policies, where the sanity of the insured at the time he died by his own hand is called into question.[44]

§ 99. Spendthrifts and habitual drunkards

There are cases where persons, by idleness, excessive drinking, gambling, and general debauchery, so prostitute their moral natures and weaken their will powers, and even mental powers, that the law as a matter of public policy places them in the class of incompetents and recognizes them as in a measure insane. The matter is usually based on the statutes of the different states, and such persons are variously known as spendthrifts,[45] habitual drunkards, etc.[46]

[43] Merritt v. State, 39 Tex. Cr. R. 70, 45 S. W. 21; Id., 40 Tex. Cr. R. 359, 50 S. W. 385; Tubb v. State, 55 Tex. Cr. R. 606, 117 S. W. 866; Smith v. State, 95 Miss. 786, 49 So. 945, 27 L. R. A. (N. S.) 461, Ann. Cas. 1912A, 23.

[44] See ante, § 368.

[45] 2 Bouv. Law Dict. p. 1023.

[46] See post, § 102.

§ 100. Spendthrift

The term "spendthrift," as used in this connection, refers to a class of persons, usually of the younger type, who through excessive drinking, gambling, idleness, or debauchery are threatening to waste and dissipate their estates, so as to expose themselves and their family to want or to throw them as a charge upon the charity of the community.[47] As such persons have virtually lost control of themselves, they are looked upon for all practical purposes as incompetents. This is not confined to men alone, but may be made to apply to women as well, where their conduct justifies it.[48] As such incompetents, spendthrifts are subjected to being placed under guardianship, and have guardians, committees, or conservators appointed to restrain them and look after their estates as in case of insane persons proper.[49] The exercise of such power on the part of the state is placed on much the same grounds as that authorizing the restraint of such persons non compos mentis. The improvidence of such a one threatens to impoverish him, expose him to want, and make him a burden upon his family and society at large, and against this threatened burden society has a right to protect itself by proper and reasonable restraint of the spendthrift. It has been held, therefore, that the exercise of such authority under a statute of this nature is not depriving the spendthrift of property in violation of his constitutional rights, but is to the contrary a proceeding to preserve his property for his own use [50] and for the protection of both himself and his family.[51] However, as the powers conferred by this class of statutes are extraordinary in their nature, they are an encroachment upon the

[47] Young v. Young, 87 Me. 44, 32 A. 782.

[48] Tillinghast v. Holbrook, 7 R. I. 230.

[49] Decennial and Other Key-Number Digests, Spendthrifts, ⟸5, 6; 36 Cyc. 800.

[50] Bond v. Bond, 2 Pick. (Mass.) 382.

[51] Cushing v. Hale, 8 Vt. 38; Inhabitants of Norton v. Leonard, 12 Pick. (Mass.) 152.

individual freedom of action, and tolerated only as the safety of the individual and public policy demands their exercise in a few special instances; and the powers granted thereunder are to be exercised with considerable caution and the statutes given strict construction by the courts.[52]

§ 101. Status of spendthrift

The spendthrift, and his incapacity as such, was unknown to the common law, but is a creature of statutory enactment. Consequently, in the absence of statute, the fact of one being a spendthrift, as here used, will in no way affect his civil status, or his power of control over his property.[53] Such statutes are held, and have been held, to be constitutional,[54] but subject to strict construction as being in derogation of the common law.[55] There is in fact no change in such person's civil status till he has been declared a spendthrift and put under guardianship in accordance with statutory provisions, and the same is true where such guardianship is inoperative.[56] After he has been duly declared a spendthrift under the statute and put under the guardianship, however, he is no longer capable of contractual acts,[57] except to procure necessaries,[58] and his promise while so placed will not even operate to take a prior debt out of the statute of

[52] Inhabitants of Norton v. Leonard, 12 Pick. (Mass.) 152; Hamilton v. Court of Probate of North Providence, 9 R. I. 204; Ellis v. Cramton, 50 Vt. 608; Chalker v. Chalker, 1 Conn. 79, 6 Am. Dec. 206.

[53] 4 Bl. Com. 305, 306; O'Donnell v. Smith, 142 Mass. 505, 8 N. E. 350.

[54] Bond v. Bond, 2 Pick. (Mass.) 382.

[55] Chalker v. Chalker, 1 Conn. 79, 6 Am. Dec. 206; Ellis v. Cramton, 50 Vt. 608.

[56] O'Donnell v. Smith, 142 Mass. 505, 8 N. E. 350; Manson v. Felton, 13 Pick. (Mass.) 206.

[57] Mix v. Peck, 13 Conn. 244; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117.

[58] Leonard v. Stott, 108 Mass. 46; McCrillis v. Bartlett, 8 N. H. 569.

limitations.[59] Similarly, transfers of property by him may be set aside,[60] indorsements by him are inoperative,[61] and he may not even maintain suit in his own name.[62] In short, his civil status is practically that of a non compos under guardianship.

§ 102. Habitual drunkard

An habitual drunkard is a more restricted term than that of spendthrift. As used in this connection, it refers to the case where one has acquired a fixed habit of drinking to excess, and by reason thereof has weakened or broken down his will and judgment.[63] This vice was to some extent recognized by the common law,[64] but it largely rests on the statutes of the different states.[65] In effect, it is a disability similar to the disability of a spendthrift considered supra. Where the subject is not under guardianship, his civil status with reference to his contractual powers and control over his person and property are unaffected, except in the intervals where his mentality is subverted by intoxicants, as we have seen supra under the head of Drunkenness;[66] but, where he has been placed under guardianship, his status is largely that of any other incompetent so placed, and he cannot contract, except for necessaries, or convey or charge his property, or even maintain suit, except through his guardian.[67]

[59] Manson v. Felton, 13 Pick. (Mass.) 206.

[60] Ure v. Ure, 223 Ill. 454, 79 N. E. 153, 114 Am. St. Rep. 336; Mix v. Peck, 13 Conn. 244.

[61] Lynch v. Dodge, 130 Mass. 458.

[62] Mason v. Mason, 19 Pick. (Mass.) 506.

[63] Rude v. Nass, 79 Wis. 321, 331, 48 N. W. 555; 24 Am. St. Rep. 717.

[64] 4 Bl. Com. 864; State v. Brown, 38 Kan. 390, 397, 16 P. 259.

[65] Decennial and Other Key-Number Digests, Drunkards, ⟸1, 2; 19 C. J. 797; Cockrill v. Cockrill, 34 C. C. A. 254, 92 F. 811; In re Roberts' Estate, 197 Pa. 621, 47 A. 987; In re Larner, 79 App. Div. 134, 79 N. Y. S. 1039, 10 N. Y. Ann. Cas. 362; Makepeace v. Bronnenberg, 146 Ind. 243, 45 N. E. 336; Campbell v. Jones, 2 Tex. Civ. App. 263, 21 S. W. 723.

[66] Supra, § 53 et seq.

[67] Decennial and Other Key-Number Digests, Drunkards, ⟸2 et seq.; 19 C. J. 807 et seq.; Cockrill v. Cockrill, 92 F. 811, 34 C. C. A.

§ 103. Habitual drug addict

Much the same condition as that produced on the human body by intoxicants is produced by drugs and narcotics, and persons becoming addicted to their use have their will and reasoning powers weakened as much as in the case of habitual drunkards; the question has naturally arisen as to whether the statutory provision enacted for the protection of the latter will apply to the former. The weight of authority seems to hold that statutes enacted with reference to drunkenness will not apply to cases of persons addicted to the use of drugs and narcotics,[68] and it is likely that this same rule would be followed by the courts in case of the attempted application of the habitual drunkard statute to cases of excessive drug habit. In many of the statutes the provisions of the same statute are expressly made to apply alike to habitual drunkards and to persons habitually addicted to the drug habit, and frequently known to the criminal world as "dope fiends." Where the statutes are so worded, their provisions will, of course, apply to the last persons named in the same manner as to the first.

§ 104. Delirium

Closely associated with insanity proper is the state of mind known as *delirium*. Delirium is a wandering of the mind; the mental faculties acting without the power of volition.[69] It is more or less temporary in its character, and is usually due to

254; Pinkston v. Semple, 92 Ala. 564, 9 So. 329; In re Tarr's Estate, 10 Pa. Super. Ct. 554; Makepeace v. Bronnenberg, 146 Ind. 243, 45 N. E. 336.

[68] Com. v. Whitney, 11 Cush. (Mass.) 477; Dawson v. Dawson, 23 Mo. App. 169; Barber v. Barber (Conn.) 14 Law Rep. (O. S.) 375; Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, 6 L. R. A. 548, 17 Am. St. Rep. 313; Edwards v. State, 38 Tex. Cr. R. 386, 43 S. W. 112, 39 L. R. A. 262.

[69] Webster's Dict., tit. "Delirium"; Supreme Lodge, Knights of Honor, v. Lapp's Adm'x, 74 S. W. 656, 25 Ky. Law Rep. 74.

disease and consequent fever, which stimulates the brain action by reason of increased flow of blood. The results are either a stupor of the perception, or more or less vivid mental pictures, which arise independent of the person's volition and of the external senses. The result is an obscuring or perversion of the mind, and a consequent loss of power of rational thought and judgment.[70] Where the mind of a person is so disordered by delirium that it cannot act rationally and logically with reference to the matter in hand, such person will be considered legally insane, and acts done under the prompting of a mind in such condition will not be binding.[71] The question of its practicable application usually arises in the cases of wills made by persons in their last sickness, when the approaching dissolution has brought about the delirium. As delirium is temporary and intermitting in its character, the usual rules of temporary insanity will apply to it, and it must be shown to have existed at the particular time of the transaction in question, in order for it to be considered as insanity.[72]

§ 105. Somnambulism

Somnambulism, while not properly a form of insanity, sometimes calls for the application of the same principles that apply to insanity proper. Somnambulism is what is commonly known as "sleep-walking." It seems to be a condition between sleeping and waking, when the motor portion of the brain is active but the reason is not.[73] The subject will arise from the bed, or place where he has fallen asleep, and do acts that he has no memory of after he has fully awakened. Such somnambulists will wander about, carry off things, and hide them, commit criminal acts, and

[70] Owing's Case, 1 Bland (Md.) 370, 386, 17 Am. Dec. 311; Clark's Heirs v. Ellis, 9 Or. 128.

[71] 2 Taylor's Med. Jur. 553; Dimes v. Dimes, 10 Moore, P. C. C. 422; Kempsey v. Maginnis, 2 Mich. N. P. 49; In re Bush's Will, 5 N. Y. S. 23.

[72] See cases cited in note 71.

[73] Ray, Med. Jur. § 495; 1 Whart. & S. Med. Jur. (4th Ed.) § 492 et seq.; 16 Am. & Eng. Enc. of Law. 565; Bouv. Law Dict. p. 3091.

venture into places of danger without the consciousness of what they are doing. It has been held that such a state of somnambulism will be looked upon as legal insanity, even to the extent of excusing the crime of murder committed under its promptings,[74] inasmuch as he has no conscious knowledge of his acts or intentions with reference to them, and the act being looked upon as committed under the impulse of an insane delusion, and therefore not such as could be charged against the perpetrator.[75] By some authorities another form is recognized known as "somnolentia." This is said to be a state where the effect of sleep still continues over the mind after the person affected has apparently fully awakened, and as a result a stupor or intoxication of the senses is produced, which temporarily destroys moral agency.[76]

§ 106. Exception to rule

An exception to the rule that reorganizes such a state as a defense to crime has been suggested, where the criminal, or somnambulist, by dwelling in his mind upon the act, especially where he knows it to be criminal, has led to the commission of the act during one of the fits of somnambulism. This is placed on the grounds that the acts of a somnambulist are but the reflex of the ideas that dwell in the mind during waking hours, and work themselves out in the acts after the control of reason is lost in sleep. The theory for it seems to be very much like that by which the conduct of the drunkard is condemned; that is, that no man should find excuse for his acts in a state to which he has brought himself by his own acts.[77] However, the course of reasoning is generally considered too refined and speculative, and the exception disregarded.[78]

[74] Fain v. Com., 78 Ky. 185, 39 Am. Rep. 213.
[75] Fain v. Com., 78 Ky. 183, 39 Am. Rep. 213.
[76] Fain v. Com., 78 Ky. 183, 39 Am. Rep. 213.
[77] Hoffbaur's Die Psychologie, c. 4, art. 2.
[78] Tayl. Med. Jur. 744; Gray, Med. Jur. 265; Whart. & S. Med. Jur. 492; Rush on the Mind, 302; 18 Am. Jur. of Ins. 236.

§ 107. Hypnotism

Another interesting, if not so practical, form of loss of free agency, partaking of the general nature of insanity, is found in the different forms of what is known as hypnotism. Hypnotism has been defined as artificially induced somnambulism.[79] It is said to affect the subject in somewhat the same manner as of catalepsy. The question of hypnotism has been the subject of a vast deal of discussion, but its very existence is still strongly questioned by eminent authority. It is claimed, by those who assert its practical existence, that the subject can be thrown into a deep sleep, or somnambulistic state, by the person exercising the hypnotic influence, and that, while he is in that state, he can be made to follow the suggestions of the hypnotizer, made to the subconscious mind of the subject. While under such influence, the person hypnotized is supposed to have no more conscious control over his action than a somnambulist.[80] It is also claimed that the influence of hypnotism is used in procuring the submission of the person hypnotized to commit criminal acts. A frequent example is given as that of sexual crimes committed by the hypnotizer upon the person hypnotized, the submission of the victim, usually a female, being secured through the influence of hypnotism.[81]

§ 108. Its status before courts of Europe

Hypnotism has had a place in the courts of Europe for some time, in spite of determined opposition to it by many eminent jurists and scientific authorities. It has been pleaded as a defense to crime in much the same way as insanity; i. e., that the person under such influence did not act through his own rational

[79] Bouv. Law Dict., tit. "Hypnotism"; Austin v. Baker, 110 App. Div. 510, 96 N. Y. S. 814.

[80] Hypnotism and crime, 13 Medico-Legal Jur. 239; Case of Czynski, 14 Medico-Legal Jur. 150; Hypnotic Influence in Crim. Cases, 51 Alb. L. J. 87; Per. of British Med. Ass'n, II Med. Leg. Jur. 73.

[81] 2 Witthaus & Becker, Med. Jur. 434, 435, 454.

senses and judgment, but was entirely under the control of the suggestions of the hypnotizer. Under such condition, the hypnotizer is said to be the principal and the person under the influence of his spell is but the passive instrument of his criminal intents.[82]

§ 109. Its status before courts of America

The doctrine of hypnotism has found some support in the legal world of America and has been the subject of much academic discussion pro and con.[83] It has even to some slight extent been recognized by the courts of this country,[84] as, for example, that a person might exercise a hypnotic influence on a witness testifying for him;[85] but it has not yet gained an established place in our jurisprudence, and its practical application is strongly questioned by the courts[86] on this side of the Atlantic.

§ 110. Difficulty of its application

The greatest difficulty in the way of the courts in the practical application of the doctrine of hypnotism is the almost impossibility of satisfactory proof, and its near approach to the everyday influence of a stronger mind over a weaker one. A moment's thought will enable one to see the extreme difficulty of proving so intangible a thing as the influence exercised by one mind over another, except where it can be inferred from the conduct of the parties. And where the influence is so shown, the

[82] 2 Witthaus & Becker, Med. Jur. 452; Case of Czynski, 14 Medico-Leg. Jur. 150; Bompart-Eyraud Case, 3 Am. Lawyer, 535.

[83] Has Hypnotism a Place in Law, 1 Kan. City Bar Monthly, 20; Case at Tacoma, 3 Am. Lawyer, 5; Clevenger, Med. Jurprudence of Ins. 107. See 40 L. R. A. 269 et seq.

[84] State v. Donovan, 128 Iowa, 44, 102 N. W. 791; State v. Lawson (Del. Gen. Sess.) 65 A. 593; State v. Exum, 138 N. C. 599, 50 S. E. 283.

[85] State v. Exum, 138 N. C. 599, 50 S. E. 283.

[86] People v. Worthington, 105 Cal. 166, 38 P. 689; People v. Ebanks, 117 Cal. 652, 49 P. 1049, 40 L. R. A. 269.

jury is met with the problem of where mere influence of a stronger mind over a weaker one ceases and hypnotic influence commences. The matter is undoubtedly capable of great abuses, and for that reason the courts of English-speaking countries have looked askew at it. There is, however, authority for the expectation that it will at a future day take its place in law as a recognized form of insanity.[87]

§ 111. Dementia in general

Dementia is the third general class of insanity. It is that form of mental derangement in which there is a loss of mind. It is characterized by an absence of, or inability to logically associate, ideas rather than by a mass of distorted or unconnected ideas, as in the case of mania. It is distinguished from amentia, in that it is a subsequent loss of reason, rather than a prior absence of it. It seems to be a general breaking down of the mind, due to disease of the brain, injury, or old age. Persons affected by it are melancholy, and the mind seems unable to grasp with clearness the things transpiring about them and to retain them in the memory. For this reason they are held not to be able to act rationally in their relations with other members of society, are easily imposed upon, and for that reason the law takes cognizance of the disorder as a form of legal insanity.[88]

§ 112. Senile dementia

Senile Dementium, or the madness of old age, is that form of dementia caused by the weakening of the mind from the decay of old age.[89] It is marked by slowness and weakness, indicating the breaking down of the mental powers in advance of bodily de-

[87] See authorities cited and discussed in 40 L. R. A. 269 et seq.

[88] 1 Bouv. Law Dict. p. 833; Chap. Med. Jur. p. 229; Owings' Case, 1 Bland (Md.) 370, 17 Am. Dec. 311; Hall v. Unger, 11 Fed. Cas. 261, No. 5,949, 2 Abb. U. S. 507, 4 Sawy. 672.

[89] 1 Bouv. Law Dict. 833; Graham v. Deuterman, 244 Ill. 124, 91 N. E. 61; Ownby v. Supreme Lodge Knights of Honor, 101 Tenn. 16, 46 S. W. 758.

cay.[90] The person affected becomes petulant and childish, having foolish likes and dislikes. This is what is spoken of in our folklore as "the second childhood," and is a matter of frequent remark among very old persons. It also sometimes gives rise to a form of insanity known as *Insane Aversion.*

§ 113. Insane aversion

Insane aversion consists of a condition of the mind which fosters an unreasonable and unfounded dislike for certain persons, frequently their closest kin. The question of its existence usually arises in case of contested wills, where the testator's testamentary capacity is called into question.[91] There is considerable difficulty in finding the line of demarcation between mere prejudice and plain human dislike, on the one hand, and insane aversion, on the other. However groundless they may be, the former can have no effect on acts done under their promptings. As has been said by one of our courts: "It must be remembered that in this country a man's prejudices are a part of his liberty. He has a right to them." [92] One may without any apparent reason have violent dislikes for the natural objects of his affections, and act however unkind and brutal towards them, without being considered demented, unless it is shown that such acts arise out of a diseased mind, such as will deprive him of logical reasoning powers, or amount to mania or delusion.[93] Human likes and dislikes are frequently hard to understand or explain, even in the more intelligent. They may rest upon the most trivial causes.

[90] Hiett v. Shull, 36 W. Va. 563, 15 S. E. 146; Gates v. Cole, 137 Iowa, 613, 115 N. W. 236; Graham v. Deuterman (1910) 244 Ill. 124, 91 N. E. 61.

[91] Simpson v. Simpson, 145 Ky. 45, 139 S. W. 1100; Lancaster v. Lancaster's Ex'r (Ky.) 87 S. W. 1137; In re Trich's Ex'r v. Trich, 165 Pa. 586, 30 A. 1053; In re Segur's Will, 71 Vt. 224, 44 A. 342.

[92] Cauffman v. Long, 82 Pa. 73.

[93] Weston v. Hanson, 212 Mo. 248, 111 S. W. 44; Stewart v. Lyons, 54 W. Va. 665, 47 S. E. 442; In re Spencer, 96 Cal. 448, 31 P. 453; American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; In re Butler's Will, 110 Wis. 70, 85 N. W. 678.

It is sometimes difficult to explain to ourselves why we dislike one person and are attracted to another. Yet we would resent any attempt to question our rights to such likes and dislikes. Hence no amount of mere bias of mind, even to the extent of being irrational, will be taken into account.[94] It is only when some delusion or mania distorts the reason, or some affection of the mind clouds the judgment, that an aversion will be taken into account.[95]

§ 114. Extent of derangement

Of course, like all other forms of insanity, not total in its effect upon the mind, the derangement must extend to the matter sought to be avoided,[96] and must be sufficiently advanced to affect the mind to the degree ordinarily required to amount to legal insanity, under the circumstances of the case.[97]

[94] Williams' Ex'r v. Williams, 90 Ky. 28, 13 S. W. 250.

[95] Prather v. McClelland, 76 Tex. 574, 13 S. W. 543; Potter v. Jones, 20 Or. 239, 25 P. 769, 12 L. R. A. 161; Fulton v. Freeland, 219 Mo. 494, 118 S. W. 12, 131 Am. St. Rep. 576; In re Hemingway's Estate, 195 Pa. 291, 45 A. 726, 78 Am. St. Rep. 815.

[96] Hamon v. Hamon, 180 Mo. 685, 79 S. W. 422; Calligan v. Haskell (1911) 143 App. Div. 574, 128 N. Y. S. 293; In re McNitt's Estate (1910) 228 Pa. 71, 78 A. 32.

[97] Jones' Succession, 120 La. 986, 45 So. 965; Gates v. Cole, 137 Iowa, 613, 115 N. W. 236.

CHAPTER 5

CAUSES OF INSANITY

Sec.
115. Causes of insanity, in general.
116. Importance of inquiry into cause.
117. Causes of amentia.
118. Causes of mania in general.
119. Inherited, from drugs, injuries, etc.
120. Masturbation.
121. Affection of nerves.
122. Causes of dementia.

§ 115. Causes of insanity, in general

The causes of insanity are very varied. As we have explained heretofore, insanity is now considered to be the result of some disease of the brain cells, and the causes that first give rise to it are necessarily as varied as the ills that attack the other portions of man's body. As well said by the United States Supreme Court: "The causes of insanity are as varied as the varying circumstances of man.

> "'—— Some for love, some for jealousy,
> For grim religion some, and some for pride,
> Have lost their reason; some for fear of want,
> Want all their lives; and others every day,
> For fear of dying, suffer worse than death.'" [1]

As will appear, it is a subject that properly belongs to the field of medical science rather than that of jurisprudence, inasmuch as the law looks at the resulting mental status of the individual, without stopping to inquire the process by which he arrived at it, except to throw light on such present conditions. For this reason we will refer the reader to the proper field of medicine and medico-legal works for a full treatment of the subject, and

[1] Mutual L. Ins. Co. v. Terry, 15 Wall. 580, 21 L. Ed. 236.

will confine ourselves briefly to such causes as have been recognized by the courts.

§ 116. Importance of inquiry into cause

Inquiries into the source and causes of insanity become pertinent, very frequently, in aiding the courts in determining the actual existence of insanity. The doctrine of cause and effect is now generally recognized, and it is frequently desirable to show the presence of a superinducing case for insanity, in order to show that the insanity itself exists. Having shown that the cause and condition exists from which insanity naturally and usually springs, it may well be inferred that it has resulted as the natural result thereof. It is therefore pertinent to ask an expert witness, testifying in a case, as to the symptoms of insanity, with special reference to the case then on trial,[2] and to have such witness to explain the nature thereof and to state whether given traits are indications of vice or disease.[3] Similarily, where derangement is claimed to have been brought on by excessive use of drugs, etc., it is competent to show the usual effect of such drugs upon the mind, in order to show a probable cause for the alleged derangement.[4] For the same reason, an expert witness may be questioned as to the probable effect of insanity in the progenitors, and as to the probable effect of worry, anxiety, great mental stress, etc., upon the mind, in order to show a probable cause for the alleged insanity.

§ 117. Causes of amentia

As we have already seen under that head in the previous chapter, amentia is caused by the arrested development of the brain. This is the direct cause, but the indirect cause usually lies further back, frequently in the parent or the grandparent. It has been stated on high authority, and demonstrated by statistics, that

[2] Lake v. People, 1 Parker, Cr. R. (N. Y.) 495.
[3] U. S. v. Guiteau, 1 Mackey, 498, 47 Am. Rep. 247.
[4] Rogers v. State, 33 Ind. 543.

from one-third to one-half of idiocy is traceable to inebriacy consanguineous marriages, etc. on the part of the parent. The liquor and drugs used by the parent seem to have so weakened his vigor, and affected his body in such manner, that such a parent is not as well able to procreate healthy children as are parents who have not indulged in such excesses. Certain diseases, such as syphilis and other venereal diseases, consanguineous marriages, and general moral depravity on the part of the parents have a like effect upon the mental strength of the child, and are frequently productive of idiocy, imbecility, or forms of moral-intellectual insanity.[5] The cause of amentia in the child, of course, does not necessarily lie in the parent. The arrested development of the brain may be due to injuries received in early childhood, to absence of some or all of the senses by which the brain receives impressions from the outside, such as sight, hearing, etc., or from other causes.

§ 118. Causes of mania in general

As mania is the largest class of insanity, so the causes which lead to it are proportionally large. As we have seen,[6] it is a disordered state of the mind, caused by some affection of the brain that manifests itself after the brain has developed. Any cause, then, that tends to disturb or irritate the brain, or the delicate nerve system connected with it, may produce a disturbance of the brain that will result in derangement.[7] How this is supposed to be brought about by more or less extended areas of inflamation in the brain has already been fully discussed.[8] We will notice briefly that recognition has been given by the courts to causes superinducing mania.

[5] Chap. Med. Jur. (3d Ed.) p. 220.
[6] Supra, § 29.
[7] Mutual L. Ins. Co. v. Terry, 15 Wall. 580, 21 L. Ed. 236.
[8] Supra, § 22 et seq.

§ 119. Inherited, from drugs, injuries, etc.

Insanity, especially forms of mania, may be hereditary.[9] This has been well recognized by the courts, and for that reason insanity, or insane tendencies, of a person's ancestors, may be shown as a circumstance to prove that such person is predisposed to insanity. Where a line has once been tainted with it, it may be handed down from father to son. At times it may seemingly disappear only to reappear in later generations. In view of this, insanity of parents, etc., is pertinent to prove the insanity of the child, grandchild, etc.,[10] as corroborative of other evidence. The intemperate use of intoxicating liquors and drugs has been recognized by the courts as a procuring cause of insanity. This has already been discussed to some extent under the head of drunkenness.[11] For this reason, the recent and continued use of intoxicants, opium, morphine, cocaine, and similar drugs may be shown as a cause of derangement.[12] Injuries, especially on or about the head and on the neck near the base of the brain, may be followed by derangement. So delicate is the brain that only a small shock will sometimes cause a concussion. The same result may sometimes follow great exposures and privations.

§ 120. Masturbation

Perhaps one of the most flagrant causes of mania is that of masturbation, or self-abuse. This seems to sap the vitality, until the brain is reached and disturbed. It is all the more dangerous, as it frequently develops into one of the more violent forms of derangement, such as homicidal mania.[13] As we have hereto-

[9] Shailer v. Bumstead, 99 Mass. 112.

[10] Dejarnette v. Com., 75 Va. 867.

[11] Supra, § 53 et seq.

[12] Rogers v. State, 33 Ind. 543; Philips v. State, 50 Tex. Cr. R. 481, 98 S. W. 868.

[13] Hurst v. State, 40 Tex. Cr. R. 378, 46 S. W. 635; 4 Buck's Hand Book on Med. Science, p. 57.

fore seen, erotic mania is most frequently the result of the low moral conditions and lives of the ancestors, particularly parents, of the sufferer. This is especially true in the case of nymphomania.[14]

§ 121. Affection of nerves

Affections of the nerves are sometimes the procuring causes of insanity. This is especially true of the milder forms. An example of such forms of affection is found in epilepsy. While not a form of insanity, epilepsy has been recognized as superinducing insanity, and evidence of it is competent for that reason.[15] Other things that violently affect the nervous system may produce a like result. Violent emotion, such as jealousy, or[16] ungoverned anger,[17] has been known to dethrone the reason. It would seem that the emotion incident to such conditions cause a profound shock to the nervous system, which in turn extends to the brain. But the courts do not look with a favorable eye on such cases of derangement, especially where the derangement is temporary.[18] Insanity has been recognized as being induced at times by violent fits of anger, which so shock the system as to derange the mind; but mere uncontrollable anger, or reckless, uncontrolled state of mind induced by passion, will not excuse, as it approaches too near to "irresistible impulse." [19]

§ 122. Causes of dementia

As has been seen, dementia, and especially senile dementia, is caused by the breaking down of the mentality. It may be caused by dissipation, or it may be caused by the natural decay of old age and failing physical strength, which communicates itself to

[14] Supra, § 89.

[15] People v. Gambacorta, 197 N. Y. 181, 90 N. E. 809, 18 Ann. Cas. 428.

[16] Sanchez v. People, 22 N. Y. 147; Mutual L. Ins. Co. v. Terry, 15 Wall. 580, 21 L. Ed. 241.

[17] Commonwealth v. Renzo, 216 Pa. 147, 65 A. 30.

[18] Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408.

[19] Anderson v. State, 67 Tex. Cr. R. 320, 148 S. W. 802.

the brain and weakens or destroys its reasoning powers.[20] One form, toxic dementia, is caused from a slow forming of poisoning.[21]

[20] Whart. & S. Med. Jur. §§ 975, 976, 979; Matter of Preston, 43 Misc. Rep. 550, 89 N. Y. S. 517; Owings' Case, 1 Bland (Md.) 370, 17 Am. Dec. 311.

[21] Black, Law Dict. tit. "Toxic Dementia."

CHAPTER 6

PROCEEDINGS TO DETERMINE INSANITY

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§ 123. Proceedings in general

Provision has been made in almost every system of jurisprudence in the world for some form of proper inquiry into the mental condition of its citizens, wherever the sanity is called into question. The mental condition of the citizen, or other person within the borders of a state, affects the status of such person, both with reference to his duties to the sovereignty and to his fellows as well, and it becomes necessary as a matter of public policy that this status be determined, so that all can be apprised of it.

The mental status of one may be called into question and determined judicially under two circumstances: First, it may be adjudicated in a direct proceeding, brought for the sole purpose of determining the person's sanity; and, second, it may arise collaterally in some other proceeding in the course of which it is called into question in the nature of an ancillary proceeding to the main case.

§ 124. Lunacy, or direct proceedings

Under the early common law the right to inquire into the sanity of the subject was committed to the king.[1] With this as authority, a writ known as the writ de lunatico inquirendo was issued in the name of the king to the sheriff of the proper county, when occasion required it, which authorized him to summons a commission to inquire into the subject's sanity.[2] Such a commission ordinarily consisted of three persons. Later, for greater convenience, a statute was passed allowing the Lord Chancellor, in behalf of the king, to issue a similar writ, known as a commission, which might be issued to a single commissioner when thought fit.[3] As we have seen supra, the power of control over,

[1] Ridgw. P. C. 224, et vid.

[2] Hutchinson v. Sandt, 4 Rawle, 234, 26 Am. Dec. 127; Harrison's Chancery, p. 491.

[3] 3 & 4 Will. IV, c. 36.

and its necessarily attendant power of inquiry into the mental status of alleged non compos subjects was, under the English law, vested in the king as a matter of common consent and public policy, and was delegated by him to the Lord Chancellor. Upon the severance of the American colonies from the authority of the English crown, this passed, with the other powers of sovereignty, to the masses of the people, to be exercised as they should direct through the proper channels.[4] In the absence of statutes delegating it to designated courts, it is generally held that such jurisdiction rests in the courts having general equitable jurisdiction in such state.

In most jurisdictions, this power has been vested, by constitutional provision or legislative enactment on the part of the federal government and the people of the different states, as a rule, in designated agencies, such as probate, chancery, etc., courts. For example, a federal statute formerly placed such jurisdiction in the Circuit Courts.[5] Where courts are so vested with jurisdiction over the insane, the jurisdiction is usually extended by implication over drunkards and other incompetents.[6]

§ 125. Equity proceedings

In some of the states[7] it seems to be held that courts of equity may reopen judgments of insanity already entered and order a new inquiry.[8] The basis for this rule is found in the inherent

[4] Howard v. Howard, 87 Ky. 616, 9 S. W. 411, 1 L. R. A. 610; Dowell v. Jacks, 58 N. C. (5 Jones, Eq.) 417; Hughes v. Jones, 22 N. E. 446, 116 N. Y. 67, 5 L. R. A. 637, 15 Am. St. Rep. 386; State ex rel. Paxton v. Guinotte, 165 S. W. 718, 257 Mo. 1, 51 L. R. A. (N. S.) 1191, Ann. Cas. 1915D, 658; State v. Ikey's Estate, 79 A. 850, 84 Vt. 363, Ann. Cas. 1913A, 575.

[5] Rev. St. U. S. § 629.

[6] 3 Pom. Eq. Jur. 335.

[7] See note 8, post.

[8] In re Dickie, 7 Abb. N. C. (N. Y.) 417; In re Zimmer, 15 Hun (N. Y.) 214; In re Colah, 6 Daly (N. Y.) 308; Gray v. Obear, 59 Ga. 675; Lawrence's Case, 28 N. J. Eq. 331; Meharry v. Meharry, 59

power of the court of equity to correct mistakes and to inquire into matters of conscience, forming a large part of fiduciary relations;[9] and this may be exercised even to the extent of treating a guardian, whose appointment is illegal for want of jurisdiction in the court appointing him, as an equitable, or de facto, guardian, for the purpose of forcing an accounting of the funds coming into his hands.[10]

§ 126. Statutory proceedings

As we have indicated statutory provision has been made in most of the states for proper inquiry into the mental conditions, where called into question, and it is held that a strict compliance with their provisions is required.[11] These statutes differ somewhat as to details of procedure, but, as they are all more or less modeled on the English statute and common-law rules, the essential elements are much the same. First, the jurisdiction is usually in the chancery or probate court, and the jurisdiction of the designated court is exclusive;[12] that is to say, it can only be exercised by the court on which it is conferred.[13] Second, the

Ind. 257; Watson's Interdiction, 31 La. Ann. 757; Walker v. Russell, 10 S. C. 82.

[9] Laird v. Dickirson, 241 Ill. 380, 89 N. E. 795; In re Stewart, 85 Wash. 190, 147 P. 1153; Hastings v. United States Fidelity & Guaranty Co., 116 Ark. 220, 172 S. W. 1016.

[10] Hastings v. United States Fidelity & Guaranty Co., 116 Ark. 220, 172 S. W. 1016; Hazleton v. Douglas, 97 Wis. 214, 72 N. W. 637, 65 Am. St. Rep. 122.

[11] In re Phillips, 158 Mich. 155, 122 N. W. 554.

[12] Chavannes v. Priestly, 80 Iowa, 316, 45 N. W. 766, 9 L. R. A. 193; Decennial and Other Key-Number Digest, tit. Insane Persons, ⇐332, 333; Decennial and Other Key-Number Digests, tit. Courts, ⇐193–480(1); 32 C. J. 633.

[13] Laird v. Dickirson, 241 Ill. 380, 89 N. E. 795; Meadors v. Walden, 28 Ga. App. 409, 111 S. E. 227; Hastings v. United States Fidelity & Guaranty Co., 116 Ark. 220, 172 S. W. 1016; In re Stewart, 85 Wash. 190, 147 P. 1153.

venue is in the county or township of the person's residence.[14] As a general rule, actual residence is required, as distinguished from mere legal or constructive residence.[15] Third, the proceeding is begun by some form of petition or complaint, by which the condition of the alleged non compos person is brought to the attention of the proper authorities.[16] These three requirements are merely of statutory regulation, and need no further explanation. The two remaining provisions, viz., that the party alleged to be insane shall have proper notice of the contemplated inquiry, and that the inquiry itself should be open with full opportunity to such person to appear and be heard, require a more extensive treatment, and we will consider them in separate paragraphs.

§ 127. Notice

The fourth essential is that proper notice of the intended inquisition must be given the alleged non compos,[17] and a statute providing for an ex parte hearing without such notice, to be given the person whose sanity is to be the subject of the inquiry, will be unconstitutional.[18] The reason is readily apparent. The ob-

[14] State ex rel. Roberts v. Hense, 135 Minn. 99, 160 N. W. 198; Beall v. Stokes, 95 Ga. 357, 22 S. E. 637; State ex rel. v. Duncan, 195 Mo. App. 541, 193 S. W. 950; State v. Servier, 136 La. 45, 66 So. 392.

[15] State ex rel. Roberts v. Hense, 135 Minn. 99, 160 N. W. 198; Matter of McMillan, 126 App. Div. 155, 110 N. Y. S. 622.

[16] Hughes v. Jones, 116 N. Y. 67, 22 N. E. 449, 5 L. R. A. 637, 15 Am. St. Rep. 386; Cox v. Osage County, 103 Mo. 385, 15 S. W. 763; Morgan's Case, 3 Bland (Md.) 332; Matter of Bischoff, 80 App. Div. 326, 80 N. Y. S. 917; Treasurer of Insane Hospital v. Inhabitants of Belgrade, 35 Me. 497; Whitlock v. Smith, 13 Fla. 385.

[17] Evans v. Johnson, 39 W. Va. 299, 19 S. E. 623, 23 L. R. A. 738, 45 Am. St. Rep. 912; Supreme Council of Royal Arcanum v. Nicholson, 104 Md. 472, 65 A. 320, 10 Ann. Cas. 213; McGee v. Hayes, 127 Cal. 336, 59 P. 767, 78 Am. St. Rep. 57; Smith v. Burlingame, 22 Fed. Cas. 459, No. 13,017, 4 Mason, 121.

[18] Buswell, Insanity, § 55; In re Lambert, 134 Cal. 626, 66 P. 851, 55 L. R. A. 856, 86 Am. St. Rep. 296; Citizens' State Bank of Trenton v. Shanklin, 174 Mo. App. 639, 161 S. W. 341; Walters v.

ject of such an inquiry is to enter upon an investigation that may result in depriving the individual of some of his most cherished rights, even to the extent of placing him in confinement,[19] and all principles of justice demand that he have full opportunity to prepare and present the facts from his standpoint.[20] The form of notice given is not very important, so long as it is sufficient to apprise the party of the intended inquisition, and is in writing and states the time and place of hearing.[21] This is, of course, in the absence of statutory requirement on the subject. Where the statute prescribes a proper mode and form of notice, it should be followed. Owing to the peculiar helpless condition of persons of this class, it would seem, in the absence of positive statutory requirement, that service of such notice need not be made on the person charged with lunacy, especially where it is shown that he was in no condition to avail himself of it. For example, it is held that notice to a person confined in an asylum may be given to the superintendent of such institution.[22] In view of this fact, the statutes of some states especially provide for service upon designated officers,[23] near relatives,[24] or on other persons designated by the orders of the court.[25] A very few go farther, and provide that notice may

McKinnis, 221 F. 748, 751, 752; White v. White, 108 Tex. 570, 588, 196 S. W. 508, L. R. A. 1918A, 339.

[19] Guardianship of Reed, 173 Wis. 628, 182 N. W. 329, 17 A. L. R. 1063.

[20] In re Lambert, 134 Cal. 626, 66 P. 851, 55 L. R. A. 856, 86 Am. St. Rep. 296; In re Kane's Estate, 12 Mont. 197, 29 P. 424; Ex parte Doxier, 4 Baxt. (Tenn.) 81.

[21] State ex rel. v. Duncan, 195 Mo. App. 541, 193 S. W. 950; McGee v. Hayes, 127 Cal. 336, 59 P. 767, 78 Am. St. Rep. 57; Kelly v. Gardner, 76 S. W. 531, 25 Ky. Law Rep. 924.

[22] In re Strang's Estate, 131 Iowa, 583, 106 N. W. 631; Shafer v. Shafer, 181 Ind. 244, 104 N. E. 507.

[23] Gray v. Inhabitants of Houlton, 65 Me. 521.

[24] Morton v. Sims, 64 Ga. 298; Munger v. Probate Judge of Kalamazoo County, 86 Mich. 363, 49 N. W. 47; Brooke's Estate, 24 Pa. Super. Ct. 430.

[25] Mosby v. Gisborn, 17 Utah, 257, 54 P. 121.

be dispensed with in violent cases, where it would be a mere empty form; but usually an order of the court must be secured permitting this, and the reasons for the omission of notice spread upon the records of the court.[26] In such matter of notice, the courts have generally looked to the spirit rather than the letter of the law, and construed the requirements so as to secure the protection of the interests of the alleged non compos. For example, they have refused to accept as sufficient service of such notice upon relatives or friends who were not interested in the inquisition and not likely to give it proper attention,[27] or to relatives who are hostile to the interests of the alleged lunatic,[28] or whose acts with reference to the notice raise suspicion of their good intentions towards the subject.[29] While notice cannot ordinarily be waived, especially where the rights of the alleged non compos might be prejudiced thereby, yet where he is present at the hearing, either in person or by attorney or other competent representatives, or had reasonable opportunity to be, the form of notice will become immaterial.[30] In this connection it is held that the constitutional requirements of *due process of law* does not call for any particular form of procedure, so long as it is a regular proceeding, in which due notice is given, and ample opportunity given to appear and oppose the complaint of lunacy;[31]

[26] Dutcher v. Hill, 29 Mo. 271, 77 Am. Dec. 572; State ex rel. Murphy v. Jackson, 93 Mo. App. 516, 67 S. W. 880; In re Vanauken, 10 N. J. Eq. 186.

[27] Com. v. Groh, 10 Pa. Co. Ct. R. 557; Matter of Hinchman, Brightly, N. P. (Pa.) 181, note, 7 Pa. Law J. 268.

[28] Matter of Hinchman, Brightly, N. P. (Pa.) 181, note, 7 Pa. Law J. 268.

[29] Yeomans v. Williams, 117 Ga. 800, 45 S. E. 73; McGee v. Hayes 127 Cal. 336, 59 P. 767, 78 Am. St. Rep. 57.

[30] Simon v. Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1165; State ex rel. Pollard v. Brasher, 200 Mo. App. 117, 201 S. W. 1150; Ex parte Scudamore, 55 Fla. 211, 46 So. 279; Moats v. Moore, 199 Ill. App. 270; Decennial and Other Key-Number Digests, tit. Insane Persons, ⇐14.

[31] Simon v. Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1165.

and the procedure of some incidental matter, such as accepting the resignation of the guardian and appointing another, will not require notice upon the insane ward.[32]

§ 128. Form of hearing

The fifth essential of commitment is that it be not determined upon an ex parte hearing, or before parties or agencies having arbitrary powers. First, the hearing must be before some sort of tribunal judicial in form, or under the supervision of the judiciary. It is an adjudication of the alleged lunatic's rights, and must be by due process of law, as that term is ordinarily understood; i. e., it must be under the form of judicial procedure recognized as due process of law by the rules of procedure of the forum. In this connection, it has been held that statutes attempting to delegate this power to agencies not charged with the exercise of judicial powers will be void. For example, the statute may not delegate such powers to a clerk of the court,[33] or to a committee of physicians,[34] etc. Second, the hearing, whatever form it may take, must be open to the alleged lunatic, with full opportunity to him to appear, either in person or by attorney or other representative, and present his side of the matter.[35] The object of the law in this respect is merely to safeguard the rights of the alleged non compos, to the end that such proceedings may not be used by the vicious or thoughtless for his injury or oppres-

[32] Chaloner v. Sherman, 242 U. S. 455, 37 S. Ct. 136, 61 L. Ed. 427, 436.

[33] In re Kane's Estate, 12 Mont. 197, 29 P. 424.

[34] Doyle, Petitioner (In re Gannon), 16 R. I. 537, 18 A. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759; In re Kane's Estate, 12 Mont. 197, 29 P. 424; White v. White, 108 Tex. 570, 196 S. W. 512, L. R. A. 1918A, 339; Appeal of Kane's Estate, 12 Mont. 197, 29 P. 424; Doyle, Petitioner (In re Gannon), 16 R. I. 537, 18 A. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759; In re Lambert, 134 Cal. 626, 66 P. 851, 55 L. R. A. 859, 86 Am. St. Rep. 296.

[35] Simon v. Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1165; Fiscus v. Turner, 125 Ind. 46, 24 N. E. 662; Royston's Appeal, 53 Wis. 612, 11 N. W. 36; In re Vanauken, 10 N. J. Eq. 186.

sion. Therefore the alleged non compos need not be present at the hearing, so long as his interests are properly looked after by others,[36] except where his presence is required by statute,[37] and his absence from the place where the inquiry is being conducted will not raise a presumption that he is being restrained by the officers in whose charge he is.[38] Authorities are divided on the question as to whether a jury trial in a lunacy proceeding is a matter of right. On the ground that it is not a class of proceeding which contemplates a jury trial, is not criminal in its character, and is not final in its effect, but may be reopened at any time, the courts of a majority of the states hold that a trial by jury in such proceeding is not a matter of right,[39] except when made so by statute or constitutional provision.[40] The courts of a few of the states, notably New York and Texas, hold, however, that the judgment in a lunacy proceeding involves both personal liberty and the use and enjoyment of property, and that a trial by jury is a matter of right.[41] It will therefore be seen that the rule depends upon the jurisdiction where the proceeding is held.

[36] Chaloner v. Sherman, 242 U. S. 455, 37 S. Ct. 136, 61 L. Ed. 427; Chavannes v. Priestly, 80 Iowa, 316, 46 N. W. 766, 9 L. R. A. 193; In re Dowdell, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290; In re Lambert, 134 Cal. 634, 66 P. 851, 55 L. R. A. 856, 86 Am. St. Rep. 296; Porter v. Ritch, 70 Conn. 256, 39 A. 169, 39 L. R. A. 359; Decennial and Other Key-Number Digests, tit. Insane Persons, ⇐ 19.

[37] Reeve's Appeal, 6 Wash. 271, 33 P. 615; McAfee v. Com., 3 B. Mon. (Ky.) 305; In re Isaacs, 1 Leg. Gaz. R. (Pa.) 17.

[38] Simon v. Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1165.

[39] Ex parte Dagley, 35 Okl. 180, 128 P. 699, 44 L. R. A. (N. S.) 389; In re Brown, 39 Wash. 160, 81 P. 552, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868; 4 Ann. Cas. 488; State v. Linderholm, 84 Kan. 603, 892, 114 P. 857; Sharum v. Meriwether, 156 Ark. 331, 246 S. W. 501; State ex rel. Armstrong v. Judge of Eighth Judicial Dist., 48 La. 503, 19 So. 475; In re Bresee, 82 Iowa, 573, 48 N. W. 991.

[40] State ex rel. Kiel v. Baird, 47 Mo. 301; State ex rel. Blaisdell v. Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525; Jones v. Learned, 17 Colo. App. 76, 66 P. 1071; State ex rel. Wilhelm v. Third Judicial District Court, 17 Mont. 411, 43 P. 385.

[41] Matter of Perkins, 105 Misc. Rep. 534, 173 N. Y. S. 520; White v. White, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339; Howard

There is also a suggestion in the decisions on the subject that the question of whether such a person is entitled to a jury under constitutional provisions guaranteeing the right of jury trials will depend on whether the procedure of such jurisdiction gave such persons a right to trial by jury at the time such constitutional provisions were adopted.[42] However, it has been suggested that, where one has been tried and acquitted by a jury on the grounds of insanity, he should subsequently be given an early opportunity of a hearing on his present sanity, in order to establish his right to his freedom in case he has recovered his right mind.[43]

§ 129. Nature of proceeding in general

The death of the person alleged to be insane halts all proceedings with reference to the inquisition;[44] but, where the inquiry proceeds, its general nature and effect is somewhat different from that of other judicial proceedings. It has been held to be a proceeding, however, in conformity with constitutional principles when the requisites of proper notice and fair and open hearing are provided for,[45] as noted supra.

As an inquisition of insanity is a regular and recognized mode of judicial proceeding, binding upon the whole world, the doctrine of lis pendens will apply, so as to charge with notice thereof all persons who may deal with, or attempt to deal with, the alleged non compos during its pendency.[46] As it is necessarily an involuntary proceeding, so far as the alleged non compos is con-

v. Howard, 87 Ky. 616, 9 S. W. 411, 10 Ky. Law Rep. 478, 1 L. R. A. 610; In re McLaughlin, 87 N. J. Eq. 138, 102 A. 439.

[42] White v. White, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339; Gaston v. Babcock, 6 Wis. 503; Ex parte Dagley, 35 Okl. 180, 128 P. 699, 44 L. R. A. (N. S.) 389.

[43] Brown v. Urquhart, 139 F. 846.

[44] Gensemer's Estate, 170 Pa. 96, 32 A. 561; Posey v. Posey, 113 Tenn. 588, 83 S. W. 1; Brown v. Urquhart, 139 F. 846.

[45] People ex rel. Sullivan v. Wendel, 33 Misc. Rep. 496, 68 N. Y. S. 948; Simon v. Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1165.

[46] L'Amoureux v. Crosby, 2 Paige (N. Y.) 422, 22 Am. Dec. 655.

cerned, it cannot be avoided by a nonsuit;[47] and cannot be dismissed by the alleged non compos without the consent of the court, judicially expressed.[48]

§ 130. Limitation of proceedings

As we have already noticed, this proceeding, known as *office found,* was originally under a writ issued out of chancery, in the name of the king, and for the purpose of determining the subject's sanity. It was also for the purpose of fixing the crown's right to control the estate of the non compos, as such lunatic then became a ward of the crown.[49] The common law being in force in the American colonies at the time of their severance from the English crown, this proceeding was taken over with the body of the common law, except that the writ was made to run in the name of the people, and it was undertaken in behalf of society to determine a person's sanity, in order to fix his status in society.[50] The nature of the proceeding, therefore, is merely an inquiry on behalf of society to determine the subject's present mental condition. The object is not to punish or to determine definitely any property rights, but is intended to fix the mental status of such person at the time of the proceeding, and to determine for the time being the propriety of appointing a guardian or taking other steps to preserve his property, both for his own protection and that he may not become a charge upon society.

47 Galbreath v. Black, 89 Ind. 300.

48 State ex rel. Paxton v. Guinotte, 257 Mo. 1, 165 S. W. 718, 51 L. R. A. (N. S.) 1191, Ann. Cas. 1915D, 658.

49 Anderson's Law Dict. "Office Found"; 3 Bl. Com. 359.

50 Hughes v. Jones, 116 N. Y. 67, 22 N. E. 449, 5 L. R. A. 637, 15 Am. St. Rep. 386; In re Brown, 1 Abb. Prac. (N. Y.) 108, 109.

§ 131. Force of judgment

While a judgment in a lunacy proceeding does not have, in some respects, the conclusiveness of an ordinary judgment, because of the transitory nature of the subject it attempts to determine, yet it seems to be conclusive of the subject's mental condition at the particular time of the finding. It is held that a determination in such a proceeding that a person is sane will be res judicata of that fact to the extent that it will bar subsequent proceedings on the same facts, especially as to parties who are parties to the proceeding;[51] and a judgment of lunacy against such a person will be received as conclusive proof of the subject's insanity at the time of the finding, both as to parties to the proceeding[52] and as to strangers.[53] In Minnesota it seems to be held that in a collateral proceeding such a finding is conclusive, even at a later time.[54] It is also held that such a finding, especially when followed by the appointment of a guardian or committee, will be conclusive at a subsequent time, so as to render invalid the acts of the ward as to matters coming within the scope of the guardian's duties.[55]

But it is a matter of common knowledge that the state of insanity is not necessarily permanent, and that the status of the non compos as such may change. It is therefore the general rule that an adjudication of lunacy is only prima facie proof of the

[51] Matter of Clarkson, 186 App. Div. 575, 174 N. Y. S. 616; Id., 227 N. Y. 599, 125 N. E. 914; Mitchell v. Inman (Tex. Civ. App.) 156 S. W. 290; Cathcart v. Matthews, 105 S. C. 329, 89 S. E. 1021.

[52] Soules v. Robinson, 15 Ind. 97, 62 N. E. 999, 92 Am. St. Rep. 301.

[53] Holliday v. Shepherd, 269 Ill. 429, 109 N. E. 976, 7 A. L. R. 558; Pritchett v. Thomas Plater & Co., 144 Tenn. 406, 232 S. W. 961; Witty v. State, 69 Tex. Cr. R. 125, 153 S. W. 1146; Rath's Committee v. Smith, 180 Ky. 326, 202 S. W. 501.

[54] Minnesota Loan & Trust Co. v. Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418.

[55] Soules v. Robinson, 158 Ind. 97, 62 N. E. 999, 92 Am. St. Rep. 301; Lucas v. Parsons, 23 Ga. 267.

subject's insanity at a time subsequent to the findings; that is, the effect of the judgment in lunacy at a time subsequent to its rendition is to prima facie fix the status of the subject as that of a lunatic, and the insanity of the subject can be questioned and the contrary proven by competent proof.[56]

§ 132. Scope of inquiry

The scope of the inquiry on a lunacy procceding is to fix the status of the alleged non compos person with reference to whether he is sane or insane, to the end that he himself and the public at large may be protected against his indiscretions and may know how to deal with him. No question of property or contractual rights either of the non compos or of third parties are considered, except to inquire as to the extent of the property of the non compos in order that a means for his support may be found and the state relieved of the burden thereof.[57]

§ 133. Vacating and review

As the judgment, even as to the non compos subject, is not final, it should always be subject to being reopened, in order to enable the non compos and his friends to show a restoration to sanity, or, in proper cases, to review the facts and secure relief

[56] Decennial and Other Key-Number Digests, tit. Insane Persons, ⟸24, 25; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1; Holliday v. Shepherd, 269 Ill. 429, 109 N. E. 976, 7 A. L. R. 558; Small v. Champeny, 102 Wis. 61, 78 N. W. 407; Boschen v. Stockwell, 224 N. Y. 356, 120 N. E. 728; Carter v. State, 102 Tex. Cr. R. 517, 278 S. W. 840; Lucas v. Parsons, 23 Ga. 267; Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. Rep. 386; Huffaker v. Brammer, 193 Ky. 267, 235 S. W. 727; Aber v. Clark, 10 N. J. Law, 217, 18 Am. Dec. 417; Knox v. Knox, 30 S. C. 377, 9 S. E. 353; Herndon v. Vick, 18 Tex. Civ. App. 583, 45 S. W. 852; 32 C. J. 643 et seq.; Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 632, 15 Am. St. Rep. 386.

[57] Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 632, 15 Am. St. Rep. 386; Talbot v. Chamberlain, 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254.

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from any mistake or injustice done in the course of the inquisition, and it has been uniformly held that statutes which do not provide for such reopening of the judgment, or which attempt to withhold the right of reopening the matter from the non compos and place it arbitrarily in the hands of another, are repugnant to the Constitution and void.[58]

§ 134. Collateral attack

Whether such judgments can be attacked collaterally depends somewhat on just what is meant by the term. It cannot ordinarily be attacked for errors and irregularities in the proceeding, unless they appear of record, and the presumption will be in favor of the regularity of the judgment, where rendered by a court of competent jurisdiction.[59] Where the attack in collateral matters is directed at the binding force of the judgment, with reference to the fact of insanity it purports to establish, it has already been seen that the judgment is merely prima facie proof of that fact.

§ 135. Exterritorial effect

In deference to the rules of comity existing between the states, a judgment of lunacy entered in a sister state,[60] and possibly that of a foreign country as well,[61] will be given the same force as a domestic judgment. A regularly rendered judgment of lunacy in one state stands as valid until set aside by the courts of that state, except where it has been procured by fraud, and such

[58] Walters v. McKinnis, 221 F. 746; Decennial and Other Key-Number Digests, tit. Insane Persons, ⊜26, 29. See ante, § 163.

[59] McGee v. Hayes, 127 Cal. 338, 59 P. 767, 78 Am. St. Rep. 57; Anderson's Committee v. Anderson, 161 Ky. 18, 170 S. W. 213, L. R. A. 1915C, 581; Mitchell v. Inman (Tex. Civ. App.) 156 S. W. 290; Chaloner v. Sherman, 242 U. S. 455, 37 S. Ct. 136, 61 L. Ed. 427.

[60] Herndon v. Vick, 18 Tex. Civ. App. 583, 45 S. W. 852; Com. v. Kirkbride, 2 Brewst. (Pa.) 419, 7 Phila. 8; Gasquet's Interdiction, 147 La. 722, 85 So. 884.

[61] Ex parte Gillam, 2 Cox, Ch. 193, 30 Eng. Reprint, 89, 2 Ves. Jr. 587.

judgment is not affected by a subsequent judgment to the contrary rendered in another state. Therefore a federal court is without power to inquire into such a judgment of a state court having jurisdiction to render the same.[62]

§ 136. What amounts to insanity

That act of depriving a person of the right of control over his actions and affairs, and of placing such control in the hands of another, as of a guardian or committee, is necessarily harsh and repugnant to the Anglo-Saxon idea of personal liberty in the individual. Therefore the confinement of an alleged non compos, and the solemn declaration that he is no longer a reasoning being, competent to deal with his fellows, can only be justified by public safety and the necessity of protecting such person against injury to himself and his property through his own indiscretions. As a consequence, there must be a real and present necessity for the exercise of such power by the state. The necessity arises where the person in question has become so mentally deranged that he is a menace to the physical and moral well-being of a community, or when he cannot give the degree of intelligent attention to his business which is necessary for its conduct, or handle his property so as to prevent its waste,[63] unless a different test is prescribed by local statutes, which must, of course, be followed.[64]

[62] Chaloner v. Sherman, 215 F. 867.

[63] In re Lindsley, 43 N. J. Eq. 9, 10 A. 549; Emerick v. Emerick, 83 Iowa, 411, 49 N. W. 1017, 13 L. R. A. 757; Leatherman v. Leatherman, 82 W. Va. 748, 97 S. E. 294; In re Wetmore's Guardianship, 6 Wash. 271, 33 P. 615; In re Streiff, 119 Wis. 566, 97 N. W. 189, 100 Am. St. Rep. 903.

[64] Upton's Committee v. Bush, 135 Ky. 102, 121 S. W. 1005; Schulmeyer v. McAllister, 171 Cal. 340, 153 P. 233; Com. v. Reeves, 140 Pa. 258, 21 A. 315; Overseers of Poor of Fairfield v. Gullifer, 49 Me. 360, 77 Am. Dec. 265.

§ 137. Grounds for commitment

From the first standpoint, then, as a matter of public policy, and as a part of the police power inherent in a state, society has the right to restrain mental defectives, who threaten to endanger the safety of the public. It is evident that a raving maniac is a constant menace to his fellows. Indeed, one of the controlling ideas of persons so afflicted is an uncontrollable desire to commit some criminal act, as, for example, in the case of kleptomania, or an uncontrollable desire to steal, homicidal mania, or an insane impulse to commit homicide, pyromania, or a morbid, insane propensity for incendiarism, etc. It is therefore the province and duty of the state to restrain such a one and provide for the safety of the public at large.[65]

§ 138. Public welfare

Not only may an insane person be restrained to prevent him from inflicting physical injury upon the members of a community, but he may also be restrained from doing acts that might endanger the moral welfare of society as well. In this connection, it has been held that a statute authorizing the confinement of one who by reason of insanity has become a danger to the community will authorize the confinement of an insane person who makes an indecent exposure of his person, inasmuch as such an act on the part of the non compos is calculated to endanger the public morals.[66]

[65] Sporza v. German Sav. Bank, 172 N. Y. 8, 84 N. E. 406; Fitzpatrick's Committee v. Dundon, 179 Ky. 784, 201 S. W. 339; Equitable Trust Co. v. Garis, 190 Pa. 544, 42 A. 1022, 70 Am. St. Rep. 644.

[66] Board of Com'rs of Montgomery County v. Ristine, 124 Ind. 242, 24 N. E. 990, 8 L. R. A. 461.

§ 139. Welfare of non compos

From the second standpoint, viz., the good of the non compos himself, it is equally necessary to restrain his irresponsible acts, and to place the free exercise of his irrational will under the control of the normal mind of a guardian or committee. There are two grounds on which this right so to restrain a non compos is predicated: First, by the threatened waste of his estate, he is likely to become a public charge, and society may avoid such a threatened burden upon itself by timely interference. Secondly, under the common law the sovereign was, in his capacity of omnia patria, ipso facto guardian of all insane persons within his realms, and in that capacity he had the right to exercise such wholesome restraint over them as their welfare required. When, as we have already noted supra, the people of the American colonies took over the functions of sovereignty, they took over this right and duty, along with the others belonging to the crown, and now exercise it to the same end.[67]

§ 140. Necessary extent of derangement

To justify the exercise of restraint over the non compos, there must be such a degree of mental weakness on the part of the person restrained as will make the restraint imperative for the ends we have discussed above. There must be something more than a mere mental weakness.[68] Mere loss of memory,[69] great age and infirmity,[70] or moral depravity [71] will not of itself be suf-

[67] Delaware County v. McDonald, 46 Iowa, 171.

[68] In re Morgan, 7 Paige (N. Y.) 236; Davren v. White, 42 N. J. Eq. 569, 7 A. 682; English v. Porter, 109 Ill. 291; Henderson v. McGregor, 30 Wis. 80; Upton's Committee v. Bush, 135 Ky. 102, 121 S. W. 1005; In re Lindsley, 43 N. J. Eq. 9, 10 A. 549; Caple v. Drew, 70 Kan. 136, 78 P. 427.

[69] In re Holmes, 4 Russ. Ch. 182.

[70] Com. v. Reeves, 140 Pa. 258, 21 A. 315; Darling v. Bennet, 8 Mass. 129.

[71] Schick v. Stuhr, 120 Iowa, 399, 94 N. W. 915.

ficient; but the person must be so weak mentally that any act he may do can be set aside on the grounds of mental deficiency.[72] The question in such case is not one of whether or not the person is so mentally weak as to be open to imposition and fraud. That is a question that a court of equity will determine upon the facts of each case, taking into consideration the mental weakness as an element of the fraud.[73] But it is a question of whether or not the person has sufficient strength of mind to act in the ordinary affairs of life, and is not a question of whether he is capable of exercising the care and foresight of an ordinary person. "The law does not assume to measure the different degrees of the power of the human intellect, or to distinguish between them when the power of thought and reason exists."[74] Two things seem to be necessary to constitute a normally sane person, in this respect, capable of being trusted to attend to his own affairs, without injury to himself or to society, viz.: (a) There must be *reason,* or the power to associate ideas in their proper relation to one another. In brief, the party must be capable of understanding what he is doing; and, however improvident or even foolish his acts may be from a business standpoint, that fact will not be sufficient to disqualify him as a sane person, if he has the degree of understanding above noted. (b) He must have such a degree of memory as will enable him to retain the ordinary affairs of life in his mind long enough to enable him to exercise a choice to action with reference to them. The rule is ably discussed by the Supreme Court of Iowa,[75] which concludes with the statement: "If the defendant is capable of transacting the ordinary business involved in taking care of his property, and if he understands the nature of his business and the effect of what he does, and can exercise his will with reference to such business with discretion, notwithstanding the influence of others,

[72] In re Collins, 18 N. J. Eq. 253.

[73] See § 270.

[74] Somers v. Pumphrey, 24 Ind. 245.

[75] Emerick v. Emerick, 83 Iowa, 411, 49 N. W. 1017, 13 L. R. A. 757.

he is not of insane mind within the meaning of the statute, and should not be deprived of control of his property." The test condemned in such case was one used by the lower court in charging the jury that, if the alleged non compos was not possessed of "sufficient strength of mind and ability to transact his business affairs with ordinary care and prudence, then in law he will be deemed of unsound mind."

§ 141. Measure of capacity

A very potent fact should not be lost sight of in this connection, as it will aid materially in understanding the rule. It is this: The law looks to the potential capacity of the mind to exercise the degree of intelligence required, and not to the fact of whether the person in question has actually exercised it. If a man has sufficient intelligence to understand a thing, it meets the requirement, although he may not, through weakness of will or other causes, have manifested that degree of intelligence in his acts with reference to it.

Where the necessary degree of incapacity is shown to exist, it is immaterial what cause gave rise to it. The rule will be the same, whether the loss of mind arose from age, disease, intemperance, or other causes.[76] Examples have already been seen in the appointment of guardians for habitual drunkards and spendthrifts, as well as for idiots and similarly afflicted unfortunates.

§ 142. Statutes and codes

The procedure in case of lunacy is usually clearly defined in the statutes of the several states, and we have only pointed out a few general provisions with reference to them and the constitutional principles applied to them. Space will not allow a separate treatment of the codes and statutes of the different states, but that of Texas will be set out as a fair example of the statutes in general. The practitioner is referred to the state of

[76] Perrine's Case, 41 N. J. Eq. 411, 5 A. 579.

his own state, to be read in the light of the constitutional principles we have set out supra.

§ 143. Lunacy proceedings in Texas

In Texas the proceedings under which a person may be declared insane, and a guardian appointed for him, have been revised from time to time, repealed, and added to, until there is some confusion in just what comprises the statute. The original act, as it appeared in the 1911 revision of the statute,[77] was amended by the act of 1913;[78] but at least a proportion of the last act was subsequently declared unconstitutional and void.[79] In the revision of 1925, several important articles of the statute, notably those relating to the commencement of the proceeding, the apprehension of the suspected lunatic, and summoning of a jury, seem to have been omitted,[80] thereby virtually rendering the title inoperative. Procedure in such matters must therefore be based upon chapter 12 of title 69, relating to the appointing of guardians for lunatics and habitual drunkards. Because of the uncertainty of the procedure under title 92, the text will be based on the procedure under title 69.

(a) Jurisdiction

(a) The proceeding is brought in the county court of the county where the alleged insane person resides.[81] In the case of an insane married woman, the jurisdiction is fixed in the county of her husband's residence.

In this connection it is held that a judgment of insanity on the part of the ward must precede the appointment of a guardian for an alleged non compos, since the statute only authorizes the appointment of a guardian for a person of unsound mind, de-

[77] Article 150 et seq., Rev. St. Tex. 1911.

[78] Acts Tex. 1913 (Reg. Sess.) c. 163.

[79] White v. White, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339.

[80] Vernon's Ann. Civ. St. Tex. 1925, art. 5547 et seq.

[81] Vernon's Ann. Civ. St. Tex. 1925, art. 4267; Schwartz v. West, 37 Tex. Civ. App. 136, 84 S. W. 282.

fined to be an idiot, lunatic, or insane person, and his status as an idiot, etc., can only be determined after inquisition and an adjudication on the subject. For this reason, an attempted guardianship of an insane person, not preceded by such adjudication, is void, and the acts of the purported guardian are without effect.[82]

(b) Mode of commencement

(b) The proceedings are commenced by the county judge of his own motion, or on written and verified complaint of some county officer. If the county judge is satisfied that there is good cause for the exercise of his jurisdiction, he may commence the proceeding by issuing a warrant directing that the person in question be brought before him,[83] or, if the statutory complaint is made, he should issue such warrant.[84]

In this connection it is made the duty of any county officer who discovers any person in such county of unsound mind, and who is without guardian, to file complaint before the county judge, setting out that fact.[85] The complaint should set out that to the best knowledge and belief of the officer such person is of unsound mind, or an habitual drunkard, and it should state the person's name, if known, or describe him, if the name is unknown; and the complaint should be sworn to.[86]

[82] Glenn v. State, 48 Tex. Civ. App. 229, 107 S. W. 621; Ward v. Compton (Tex. Civ. App.) 203 S. W. 129.

[83] Vernon's Ann. Civ. St. Tex. 1925, art. 4267.

[84] Vernon's Ann. Civ. St. Tex. 1925, art. 4268.

[85] Vernon's Ann. Civ. St. Tex. 1925, arts. 4268, 4269.

[86] Vernon's Ann. Civ. St. Tex. 1925, art. 4269.

(c) Hearing

(c) The case is docketed on the county court docket with the county as plaintiff and the alleged insane person as defendant, and the matter proceeds to trial before a regular jury summoned and impaneled for the purpose; the whole proceeding being governed by the same rules as govern other suits in such court.[87]

If the jury finds that the defendant is of unsound mind, the court should enter judgment to that effect and proceed without further notice to appoint a guardian.[88] If he is found to be sane, judgment should be entered giving effect to the finding, and the defendant should be discharged. Where a guardian is appointed, the further proceeding under the guardianship is governed by the provisions of title 69, relating to guardianship in general.[89] In such proceeding, the defendant has a right to reasonable opportunity to secure counsel of his own selection and to summon witnesses in his own behalf, and has a right to a trial before a jury selected after an examination and testing in the usual form.[90]

(d) Restraint after judgment

(d) After one is adjudged insane and a guardian appointed for him, the guardian is charged with his proper care until he can be cared for in one of the state asylums;[91] and, if the guardian does not restrain him, he may be apprehended and confined under the directions of any magistrate.[92] The husband or wife, as the case may be, has a prior right to appointment as guardian;[93] and the husband or wife, father or mother, children and grandchildren, and the county where the insane person resides,

87 Vernon's Ann. Civ. St. Tex. 1925, arts. 4270, 4271.
88 Vernon's Ann. Civ. St. Tex. 1925, art. 4272.
89 Vernon's Ann. Civ. St. Tex. 1925, arts. 4272–4274.
90 Warrick v. Moore County (Tex. Civ. App.) 291 S. W. 950.
91 Vernon's Ann. Civ. St. Tex. 1925, art. 4277.
92 Vernon's Ann. Civ. St. Tex. 1925, art. 4278.
93 Vernon's Ann. Civ. St. Tex. 1925, art. 4276.

are, in the order named, liable for his maintenance,[94] where the insane person has no estate.

(e) Appeal and review

(e) A new trial or hearing may be granted within ten days after the verdict has been returned; but, where two juries have concurred in the case, the second verdict may not be set aside and a new hearing granted.[95]

In this connection it has been held that no appeal lies to the district court, where the question of insanity alone is involved;[96] but it is held that the judgment of the county court with reference to the determination of a person's sanity and the appointment of a guardian for him may be reviewed by certiorari from the district court, where it will be tried de novo.[97] The distinction seems to lie in the fact that the adjudication of insanity alone is merely incident to the commitment to an asylum without right to appeal;[98] while an adjudication as incident to the appointment of a guardian partakes of the nature of a probate proceeding, over which the district court has jurisdiction by express provision of the statute,[99] and by constitutional provision.[1] The matter may also be reviewed by habeas corpus proceeding, brought on in behalf of the defendant.[2]

94 Vernon's Ann. Civ. St. Tex. 1925, art. 4279.
95 Vernon's Ann. Civ. St. Tex. 1925, art. 4273.
96 Leonard v. Dallas County (Tex. Civ. App.) 292 S. W. 249.
97 Warrick v. Moore County (Tex. Civ. App.) 291 S. W. 950; Hefley v. Hugen, 56 Tex. Civ. App. 273, 120 S. W. 956.
98 See post, §§ 163, 214.
99 Vernon's Ann. Civ. St. Tex. 1925, arts. 4318, 4103.
1 Const. Tex. art. 5, § 8.
2 White v. White, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339.

(f) Restoration and discharge

(f) Upon a written and verified statement being filed with the county judge by any credible person, setting up the fact that a person that has theretofore been adjudged of unsound mind, or to be an habitual drunkard, has been restored to his right mind, or to sober habits, the guardian will be cited to appear before the county judge at a time and place fixed in the citation, either in term time or vacation, and show cause why the ward should not be discharged, or the guardian may appear without citation.[3] If there is any doubt as to the ward's restoration, the county judge, either in term time or vacation, should hold a hearing and submit the question of the ward's restoration to a qualified jury as in the first instance; and, if it is found that the ward has recovered, a judgment should be entered to that effect, the person discharged, and the guardian directed to make proper settlement of his account and deliver the estate.[4] If the fact of a person's restoration is not doubtful, the county judge, without the intervention of a jury, can make the order restoring him and directing an accounting by the guardian.[5] In either instance, the effect of the order is to restore the person to the status of a normal person.

§ 144. Proceeding after conviction for crime

With reference to the presentation of the question of insanity as a defense to crime, or suspension of penalty after such conviction, the courts of Texas follow the general rule, holding that the question of a defendant's sanity can be inquired into, both before and after his trial on a criminal charge.[6] The inquiry into a defendant's sanity after he has been convicted of crime is controlled by title 12, chapter 1, of the 1925 revision of the Code

[3] Vernon's Ann. Civ. St. Tex. 1925, art. 4282.
[4] Vernon's Ann. Civ. St. Tex. 1925, art. 4283.
[5] Vernon's Ann. Civ. St. Tex. 1925, art. 4284.
[6] Hunter v. State, 86 Tex. Cr. R. 384, 216 S. W. 871.

of Criminal Procedure.[7] It follows very closely the same title and chapter in previous Code of Criminal Procedure,[8] and the decisions thereunder are applicable. The fact that the code follows very closely the general procedure in the American courts,[9] makes it a fair sample of the form of procedure in such courts. It provides:

(a) Initiation of proceedings

(a) Where, after a conviction in a criminal case, the trial court has good reason to believe that the defendant is insane, or where that fact is brought to his attention by an affidavit of any respectable person stating that such person has had good reason to believe that the defendant has become insane, an inquiry should be made into the defendant's sanity. The pleading in such case is merely the affidavit; and even that may be dispensed with, where the proceedings are commenced upon the court's own motion.[10]

In this connection it has been held that the same question may be raised by a motion for new trial, especially where the insanity likely existed during the trial and at the time the crime was committed, and where it was not pleaded as a defense at the time of such trial.[11] The question may not be raised in the appellate court for the first time, but must be taken up in the trial court under the above procedure, after the mandate has been returned by the appellate court.[12]

It is almost entirely within the discretion of the trial court as to whether such inquiry should be ordered, where the question has been submitted upon the trial of the main case and the issue found against the defendant; and an appeal will not ordinarily lie from his decision refusing to order the inquiry to be made,

7 Vernon's Ann. Code Cr. Proc. Tex. 1925, arts. 921–932.

8 Vernon's Ann. Code Cr. Proc. Tex. 1916, arts. 1017–1030.

9 See supra, § 126 et seq.

10 Vernon's Ann. Code Cr. Proc. Tex. (1925) arts. 921, 922.

11 Gardner v. State, 82 Tex. Cr. R. 384, 198 S. W. 312, L. R. A. 1918B, 1144; Humphreys v. State (Tex. Cr. App.) 39 S. W. 679.

12 Escue v. State, 88 Tex. Cr. R. 447, 227 S. W. 483.

or from a decision of the court and jury finding the defendant to be sane.[13] But where the question was not submitted and passed upon during the main trial, it is mandatory on the trial court to submit it in some form when it is properly brought to his attention by affidavit, and it appears that the defendant was likely insane at the time of the trial, and not in condition to present his defenses.[14]

(b) Form of hearing

(b) The form and manner of the hearing rests within the discretion of the trial court, except that he is required to summons and impanel a regular jury as in ordinary criminal cases; such court being merely charged with the duty of so conducting the hearing that it will lead to a satisfactory conclusion.[15] If the defendant is without counsel, the court is charged with the duty of appointing one to represent him, and the defendant's counsel has the right to open and close the hearing, since he has the affirmative of the issue.[16]

(c) Commitment

(c) If the defendant is found to be insane, all further proceedings in the case against him are suspended, and the trial court should enter an order directing his commitment to the sheriff of the county to be held subject to the further order of the county judge.[17] When these proceedings have been certified to the county judge, which should be done forthwith, the county judge should take immediate steps to place the defendant in an asylum.[18]

[13] Springer v. State, 63 Tex. Cr. R. 266, 140 S. W. 99.

[14] Holland v. State, 52 Tex. Cr. R. 160, 105 S. W. 812; Humphreys v. State (Tex. Cr. App.) 39 S. W. 679.

[15] Vernon's Ann. Code Cr. Proc. Tex. 1925, arts. 923, 924.

[16] Vernon's Ann. Code Cr. Proc. Tex. 1925, arts. 923, 924; Holden v. State, 89 Tex. Cr. R. 628, 232 S. W. 803.

[17] Vernon's Ann. Code Cr. Proc. Tex. 1925, arts. 925, 926.

[18] Vernon's Ann. Code Cr. Proc. Tex. 1925, art. 927.

In this connection it is held that, where such defendant has been so found to be insane and ordered committed to an asylum, he must be retained in the asylum until he has recovered, and must then be returned to the custody of the court having jurisdiction of his trial. He cannot be admitted to bail in the meantime, even though the offense for which he is being tried is a bailable one.[19]

(d) Recovery and reconsideration

(d) Where the recovery by the defendant of his sanity is subsequently brought to the attention of the trial court by a certificate to that effect by the superintendent of the asylum in which the defendant is confined, or by the affidavit of some other credible person, such court, either in term time or vacation, must issue a writ to the sheriff, directing him to bring the defendant before him at the first regular term of the court of the county in question. Such writ is returnable in the same manner as a habeas corpus writ and under the same penalties for its disobedience.[20] Whereupon a jury should be impaneled again to try the issue of such defendant's sanity.[21] If he is found to be sane, the judgment in the original trial for his alleged crime should then be carried out;[22] but, if he is found to be still insane, he should be remanded to the asylum.[23]

(e) Appeal and review

(e) Where the defendant is found to be sane, either upon the first hearing or upon any subsequent hearing after he has been retried upon affidavit or certificate of alleged recovery, the judgment of conviction originally entered against him will be enforced as though no inquiry of insanity has been made.[24]

19 Ex parte Wilson, 67 Tex. Cr. R. 369, 149 S. W. 117.
20 Vernon's Ann. Code Cr. Proc. Tex. 1925, arts. 928–930.
21 Vernon's Ann. Code Cr. Proc. Tex. 1925, art. 928.
22 Vernon's Ann. Code Cr. Proc. Tex. 1925, art. 932.
23 Vernon's Ann. Code Cr. Proc. Tex. 1925, art. 931.
24 Vernon's Ann. Code Cr. Proc. Tex. 1925, arts. 928, 932.

In this connection, it is held that no right of appeal is given by the statute, and that the judgment is final in the trial court, so far as the finding on the inquisition of insanity is concerned.[25] It has also been held that the proceeding of the trial court, however irregular, cannot be reviewed by certiorari to the Court of Criminal Appeals.[26]

§ 145. Method of review in general

In insanity inquisitions, the right and form of review and appeal of the decisions of the lower court or commission conducting the inquisition is provided for by local statutes, usually taking the forms of appeal,[27] writ of error,[28] certiorari,[29] etc., and the statutory method in such cases is to be followed. Where no means of appeal or review are provided for by statute, none are usually allowed;[30] but the courts are nevertheless inclined to recognize that there should be some means provided whereby one adjudged a lunatic may have an opportunity of showing the error, if any, in his conviction of lunacy, and of establishing his recovery of reason where that may occur. To this end, and in proper cases, a writ of mandamus will lie to compel the discharge of a person wrongfully held as a lunatic;[31] but the most

[25] Darnell v. State, 24 Tex. App. 6, 5 S. W. 522; De Silvia v. State, 98 Tex. Cr. R. 499, 267 S. W. 271; Holland v. State, 52 Tex. Cr. R. 160, 105 S. W. 812.

[26] Ex parte Morris, 96 Tex. Cr. R. 256, 257 S. W. 894.

[27] In re Kane's Estate, 12 Mont. 197, 29 P. 424; In re Chudek, 118 Mich. 361, 76 N. W. 757; Shafer v. Shafer, 181 Ind. 244, 104 N. E. 507; In re Bristor's Estate, 115 Md. 614, 81 A. 25.

[28] Davis v. Norvell, 87 Tenn. 36, 9 S. W. 193; Shapter v. Pillar, 28 Colo. 209, 63 P. 302.

[29] Coot v. Willett, 93 Mich. 304, 53 N. W. 395; Warrick v. Moore County (Tex. Civ. App.) 291 S. W. 950; Com. v. Beaumont, 4 Rawle (Pa.) 366.

[30] State ex rel. Nolte v. McQuillin, 246 Mo. 586, 151 S. W. 444; Studabaker v. Markley, 7 Ind. App. 368, 34 N. E. 606; People v. Gilbert, 115 Ill. 59, 3 N. E. 744; Ray v. Ray, 33 N. C. 357; Leonard v. Dallas County (Tex. Civ. App.) 292 S. W. 249.

[31] Statham v. Blackford, 89 Va. 771, 17 S. E. 233.

frequent means resorted to is that of habeas corpus. The right of a non compos to secure the review of a judgment of lunacy rendered against him by the use of the writ of habeas corpus is well recognized.[32]

§ 146. Costs in general

The costs incurred in the course of an insanity inquisition, as well as on appeal thereof, are frequently controlled by statutes on the subject. In the absence of statutory regulation, the apportionment of the costs usually rests within the sound discretion of the court having jurisdiction of the proceedings.[33] The reason for this is that the proceeding arises out of necessity, and is founded upon the good faith of the person instituting it. No hard and fast rule can, therefore, be drawn for the disposition of the costs arising out of it, but they must be controlled by the facts and circumstances of each case. There are three rules, however, that are ordinarily observed in disposing of this question of costs: First, where there appears to be necessity for the proceeding, and the person in question is found to be insane thereunder, the costs are ordinarily charged against the insane person's estate,[34] since from the fact of such finding it would appear that the instituting of the inquisition was proper and for

[32] Kellogg v. Cochran, 87 Cal. 192, 25 P. 677, 12 L. R. A. 104; 29 C. J. 105 et seq.; White v. White, 108 Tex. 570, 196 S. W. 508, L. R. A. 1918A, 339; Northfoss v. Welch, 116 Minn. 62, 133 N. W. 82, 36 L. R. A. (N. S.) 578, Ann. Cas. 1913A, 1257; In re Crosswell's Petition, 28 R. I. 137, 66 A. 55, 13 Ann. Cas. 874; Sporza v. German Sav. Bank, 192 N. Y. 8, 84 N. E. 406; In re Dowdell, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290; State ex rel. Carroll v. District Court of First Judicial Dist. in and for Lewis & Clark County, 50 Mont. 428, 147 P. 612; Ex parte Dagley, 35 Okl. 180, 128 P. 699, 44 L. R. A. (N. S.) 389.

[33] In re Beckwith, 3 Hun (N. Y.) 443; Gulick v. Conover, 15 N. J. Law, 420; Com. v. Quinter, 2 Woodw. Dec. (Pa.) 377; Decennial and Other Key-Number Digests, tit. Insane Persons, ⚖28.

[34] Hallett v. Oakes, 1 Cush. (Mass.) 296; Breaux v. Francke, 30 La. Ann. 336; Wier v. Myers, 34 Pa. 377.

the best interest of the non compos. It is, moreover, prima facie evidence that the institution of the proceedings was in good faith.[35] Second, where the proceeding results in a finding of sanity on the part of the person alleged to be insane, the costs are ordinarily adjudged against the person instituting the proceeding, especially where in the course of the proceeding there is an apparent absence of probable cause for its institution, or where there is a suggestion of bad faith on the part of the instigator.[36] Inasmuch as the finding itself shows that the proceeding was not necessary, and therefore not for the best interest of the alleged non compos, and at least suggests the absence of probable cause for the institution of the same, his estate cannot be rightly charged with the expense thereof. On the other hand, the cost having been incurred by the wanton and malicious act, or gross carelessness, of the instigator, it is right that he should bear the burden of his own deliberate act. His excuse for meddling in the matter would be the exigencies of the occasion, and, the judgment having negatived the existence of any such exigencies, the excuse would fall. However, a too close adherence to this rule would be impracticable, as no one would then be willing, however apparent the necessity, to take the risk of having himself charged with the costs of such proceeding in case the apparent non compos was in fact found to be in his right mind. Hence arises the third rule, viz., that the instigator of the proceeding will not be charged with the costs so incurred, if there were any reasonably apparent grounds for the institution of the same at the time it was instituted, and the proceeding was commenced in good faith, for the supposed or apparent benefit of the person alleged to be insane.[37] Where this is found to be

[35] In re Giles, 11 Paige (N. Y.) 638.

[36] In re Welch, 108 Wis. 387, 84 N. W. 550; In re White, 17 N. J. Eq. 274; Morris v. Morris, 128 Mo. App. 673, 107 S. W. 405; Baum v. Greenwald, 95 Miss. 765, 49 So. 836.

[37] In re Sulk, 74 N. J. Eq. 736, 70 A. 661; McCracken's Case, 45 Pa. Super. Ct. 229; Carter v. Beckwith, 128 N. Y. 312, 28 N. E. 582.

the case, the costs are ordinarily paid by the county or state, as other costs incurred for the public interest.[38]

§ 147. Taxing costs

It seems to be recognized as a general rule that costs in a lunacy proceeding should be taxed in the court where the matter of the lunacy proceeding first originated. This is because it is thought that such court can better adjudge the equities between the parties, the good faith of the complainant, and probable grounds for the proceeding as viewed from the complainant's standpoint;[39] and for this reason, upon appeal to the higher courts, the lower court finally adjudges the costs. Similarly, where additional or supplemental proceedings are had, the adjudication of costs usually waits the final determination of the proceeding.[40]

§ 148. Collateral inquiry

It very frequently happens that the sanity of a person is called into question during the course of some other proceeding, which, in the main, has nothing to do with that question. The matter of the person's sanity merely becomes material as an incident of the main question. For example, in a suit to enforce a contract, the question may be presented as to whether or not the party entering into the contract had mental capacity to execute the same. In such case, this becomes a matter, incidental though it may be, that must be determined before the question of the enforcement of the contract can be properly adjudicated. Hence arises collaterally the question of insanity vel non. Where it is thus raised, two courses are open by which it can be determined, viz.: First, the main case may be halted until an inquisition can be instituted; or, secondly, the question of sanity may

[38] Strong v. City of New York, 96 N. Y. S. 1083, 110 App. Div. 188.

[39] Com. v. Quinter, 2 Woodw. Dec. (Pa.) 377; Conover's Ex'rs v. Conover, 15 N. J. Law, 420; Barbo v. Rider, 67 Wis. 598, 31 N. W. 155.

[40] Marple's Case, 15 Pa. Co. Ct. R. 310.

be tried and determined along with the other questions involved in the main case. If the latter method is followed, the question of insanity should be pleaded, and proper proof offered to show its existence and effect, all of which is considered in detail under subsequent chapters, particularly those dealing with pleading, practice, and evidence.

CHAPTER 7

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226. Accountability for ward's debts.
227. Suits between guardian and ward.
228. Finality of guardian's account.
229. Rule in Texas.
230. Settlement out of court.
231. Compensation of guardian.
232. Compensation of natural guardians.
233. Volunteer guardians.
234. Care by third parties.
235. Common carriers.
236. Rule applied to intoxicated persons.
237. Rule applied to Pullman cars.
238. Rule applied to innkeepers.
239. Mistreatment—Statutes against.

§ 149. Necessity for, in general

As has been mentioned in the opening chapter, the care of the insane has ever fallen upon their more fortunate fellows, and its proper exercise has been one of the problems of man from the beginning of history. The duty and necessity of exercising this care and control falls both on the family with which the non compos is connected, and who are bound to him by natural ties, and upon society as a whole, who are bound to him by political ones. The right of the family to exercise such restraint finds its root in the same source as the authority of the parent over the child. In addition, society, for the actual good of the unfortunate lunatic and the safety of the public at large, has been forced to undertake this duty, where the family was unable or unwilling to deal with it.

§ 150. Society's right of control

As we have indicated, the right of the state to exercise the power of restraint over non compos persons within its jurisdic-

tion rests upon the duty of society to care for and protect its members as part of its own body; i. e., the *public welfare.* As said by Mr. Tiedeman: "The state has undoubtedly the right to provide for involuntary confinement of the * * * insane, in order that proper medical treatment may be given and proper care effected." [1] Indeed, the power is said to arise out of the very necessity of the case,[2] not only on the grounds of the good of the insane person himself, as Mr. Tiedeman indicates, but for the safety of his fellows as well. In the language of Chief Justice Shaw: "The right to restrain an insane person of his liberty is found in the great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or to others, * * * and, if a man may be restrained in his own house, he may be restrained in an asylum. * * * Private institutions for the insane have been in use and sanctioned by the courts; not established by any positive law, but by the great law of necessity and humanity. Their existence was known and acknowledged at the time the Constitution was adopted." [3] For this reason, it has uniformly been held that statutes providing for the restraint and care of insane persons, and which meet certain conditions reasonable in themselves,[4] are not objectionable as unconstitutional, as false imprisonment,[5] as depriving the individual of liberty without due process of

[1] Tiedeman, Pol. Powers, 106.

[2] Cooley's Torts, 179; 11 Am. & Eng. Enc. Law, p. 112; Tiedeman, Pol. Powers, 108; Porter v. Ritch, 70 Conn. 235, 39 A. 169, 39 L. R. A. 353.

[3] In re Oaks (Mass.) 8 Law Rep. 122–124.

[4] See ante, § 154 et seq.

[5] Shapley v. Cohoon, 258 F. 752; Ex parte Clark, 86 Kan. 539, 121 P. 492, 39 L. R. A. 680, Ann. Cas. 1913C, 317; Maxwell v. Maxwell, 189 Iowa, 7, 177 N. W. 541, 10 A. L. R. 482; Bliss v. Bliss, 133 Md. 61, 104 A. 467; Wright's Appeal, 8 Pa. 57, 59; State v. Craig, 176 N. C. 740, 97 S. E. 400; Tiedeman, Pol. Powers, 108; 25 C. J. 458, 459; Decennial and Other Key No. Digests, False Imprisonment, ⚖ 3, 4.

law,[6] etc., but are a necessary exercise of the police power of the state.

§ 151. Care of insane, in general

Along with the power of control and restraint of the non compos goes the duty to care and provide for them. This duty rests primarily upon the state, especially if the retention is in a state institution;[7] but it may look for reimbursement to the estate of the non compos, if any, or to such of the insane person's relatives as are charged with his support, as will be seen ante.[8] As between the state and county, or township, the duty of caring for its indigent insane rests upon the state in the first instance; but it may ordinarily look to the county or township for reimbursement.[9] Liability in such cases is, as a rule, fixed by local statutes. We will consider the subject of restraint and care of the insane under two general heads, viz.: Such care and restraint by the state; and such care and restraint by the individual.

§ 152. Care and restraint by state

While the individual, primarily, has the right to restrain and care for insane members of society, yet the paramount duty to do this rests upon organized government in the proper exercise of its function of looking after the welfare of its citizens, to secure the well-being of those within its protection. Rules are prescribed for the apprehension and proper care of the insane

6 Chavannes v. Priestley, 80 Iowa, 316, 45 N. W. 766, 9 L. R. A. 193; In re Dowdell, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290, note; Simon v. Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1165.

7 Thomas v. Macon Co., 175 Mo. 68, 74 S. W. 999; Sweeney's Committee v. Auditor, 4 Ky. Law Rep. 837; Matter of St. Lawrence State Hospital for Insane, 13 App. Div. 436, 43 N. Y. S. 608; State v. Colligan, 128 Iowa, 536, 104 N. W. 905; Decennial and Other Key No. Digests, Paupers, ⟸3.

8 See ante, § 178 et seq.: Decennial and Other Key No. Digests, Insane Persons, ⟸52–54.

9 Decennial and Other Key No. Digests, Paupers, ⟸3; Insane Persons, ⟸55–56.

persons found within its borders, and proper agencies are designated to give effect to these provisions. "A wise administration of government does not leave to private persons to decide when these restrictions should be exercised. Private persons may not be willing to take the hazard, and so statutes are passed which directly name or authorize a municipal board to appoint some one to judge of the emergency and direct the performance of those acts which any individual might do at his peril without any statute. Such a one is the agent of the law, and incurs no personal liability." [10] We have discussed supra the methods employed for the apprehension and inquiry into the mental condition of those alleged to be insane.[11] The further care and restraint of such persons are usually effected by commitment of the same to public hospitals or asylums especially provided for them. We will treat these under the general head of *Asylums*.

§ 153. Asylums

Insane asylums, or institutions for the detention and treatment of the insane, have been in use since their first institution by pious monks in the early part of the Middle Ages. As first instituted, they were under the supervision of the religious authorities. Later the need seems to have been supplied largely by private institutions, and yet later by public ones, supervised and supported by the government itself.

In this connection it might be noted that the business of keeping a private asylum for the care and treatment of insane patients is a lawful business, that may not be interfered with by unreasonable and oppressive laws, and regulations which amount in effect to a deprivation of the right to carry on such business will be held unconstitutional.[12] However, it may not be carried on to the injury or detriment of others, and it has been held that the

[10] Chief Justice Andrews, in Porter v. Ritch, 70 Conn. 235, 39 A. 169, 39 L. R. A. 353.

[11] Supra, c. 5.

[12] Ex parte Whitwell, 98 Cal. 73, 32 P. 870, 19 L. R. A. 737, 35 Am. St. Rep. 152.

locating of such institutions in residential sections may be reasonably restricted, as, for example, forbidding their location there unless consented to by the residents of a given area.[13]

So much has the idea of the public nature of this class of institutions grown that the name is generally understood to describe an institution of that character. For example, it is held that an *asylum* for the care and treatment of insane patients is a *public institution,* within the meaning and purview of a statute or constitutional provision locating public institutions.[14]

§ 154. Commitment, in general

Generally speaking, persons may be removed to an asylum when their own welfare, or that of others, requires it. This applies, whether the persons so committed are residents or not, so long as the public welfare makes such commitment necessary.[15] It is usually preceded, as we shall see ante,[16] by proper inquisition and adjudication of insanity, except, perhaps, in very extreme cases, where immediate commitment is made imperative by the condition of the patient,[17] or where the patient's condition is doubtful, and he is received for observation and treatment only. The commitment is ordinarily predicated upon the application of some person interested in the welfare of the unfortunate, or upon the order of some court, usually probate or chancery courts, having jurisdiction of the matter under the state statute. As indicated above, the confinement of a person in an asylum presupposes insanity on the part of such person;[18] and this is so far true that, after a finding of sanity by competent authority, a patient may not be confined in an asylum on the mere direction of a guardian

[13] Shepard v. Seattle, 59 Wash. 363, 109 P. 1067, 40 A. L. R. (N. S.) 647.

[14] State ex rel. McCain v. Metschan, 32 Or. 372, 46 P. 791, 53 P. 1071, 41 L. R. A. 692.

[15] Emmerich v. Thorley, 35 App. Div. 452, 44 N. Y. S. 791.

[16] See ante, § 155.

[17] Com. v. Kirkbride, 2 Brewst. (Pa.) 400.

[18] See supra, note 15.

or other person having authority over him.[19] It necessarily follows that such commitment is governed by much the same general rules as those governing inquisitions into a person's sanity and findings of lunacy. Governed as the proceedings looking to commitment are by local statutes of the several states, there are yet a number of principles which they have in common and which we will notice.

§ 155. Proceedings incident to commitment

§ 156. Application

First. There should usually be some form of application for commitment. This is merely a formal calling of the attention of the proper authorities, as agencies of sovereignty, to the irresponsible condition of the alleged insane person, and suggesting the necessity and propriety of his being committed to an asylum. Under the statutory requirements of some of the states, this application must be made by a designated class of persons, such as guardian, relatives,[20] etc.; but, in the absence of such statutory restriction, the application may regularly be made by any creditable person.[21] There is an apparent tendency on the part of the courts to give such statutes a strict construction. For example, where the application is required to be made by *the guardian,* the application of a foreign guardian will not be sufficient.[22] Where made in good faith, it is held that the statements made in such application are privileged, and cannot be made the basis for an action in libel.[23]

[19] In re Cross' Commission, 16 R. I. 771, 19 A. 817.

[20] In re Cross' Commission, 16 R. I. 771, 19 A. 817; Davis v. Merrill, 47 N. H. 208.

[21] Davis v. Merrill, 47 N. H. 208; Brickway's Case, 80 Pa. 65.

[22] In re Rosenberg, 1 Leg. Gaz. R. (Pa.) 49.

[23] Corcoran v. Jerrel, 185 Iowa, 532, 170 N. W. 776, 2 A. L. R. 1579; Reycraft v. McDonald, 194 Mich. 500, 160 N. W. 836.

§ 157. Notice

Second. There must be some form of notice sufficient to apprise the alleged non compos person of the contemplated commitment, and of the time and place of any hearing preliminary thereto. In the language of the Minnesota court: "To the person charged with being insane to a degree requiring the interposition of the authorities, and the restraint provided for, there must be given notice of the proceeding, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to personal liberty in the future." [24] It is therefore held as a general rule that a statute which attempts to provide for the commitment of a person to an asylum, or similar place of confinement and restraint, on a mere ex parte hearing, on the certificate of physicians or clerk of the court, or where commitment is made to depend upon the "sound discretion" of a judge, and no provision is made for some competent form of hearing, of which the non compos has notice and opportunity to appear and present his side of the matter, will be held unconstitutional, as being in contravention of the federal Constitution, and of most of the state Constitutions as well, in that it tends to deprive the individual in question of his liberty without due process of law.[25] The objection to these statutes is that they place the liberty of the accused entirely within the control and disposition of another individual, or group of individuals, without securing to him his well-recognized right and opportunity of showing the right or wrong of his detention. It is, therefore, unquestionably capable

[24] State ex rel. Blaidell v. Billings, 55 Minn. 467, 57 N. W. 206, 794, 13 Am. St. Rep. 525.

[25] Evans v. Johnson, 39 W. Va. 299, 19 S. E. 623, 23 L. R. A. 737, 45 Am. St. Rep. 912; Doyle, Petitioner (In re Gannon) 16 R. I. 537, 18 A. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759; People ex rel. Ordway v. St. Saviour's Sanitarium, 34 App. Div. 372, 56 N. Y. S. 431; In re Lambert, 134 Cal. 634, 66 P. 851, 55 L. R. A. 860, 86 Am. St. Rep. 296; In re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729.

of unlimited abuse, and is foreign to the spirit of the common law and of constitutional government. But the strict requirement is much relaxed where it is shown that notice was given relatives, etc., and where it is shown that notice to the non compos would have been useless or harmful.[26]

§ 158. Lack of notice—Effect of

While the absence of notice will not ordinarily subject a judgment of commitment to collateral attack, where that fact does not affirmatively appear of record, yet the absence of notice will serve to vacate the judgment, where it is brought to the attention of the court by a direct proceeding instituted by the alleged non compos or for his benefit.[27] Even where the statute under which the proceeding is had does not provide for notice, it will be presumed nevertheless that it was intended for notice to be given.[28] But it would seem that there is no strict rule requiring notice to be given persons indirectly interested in the matter of the commitment, as, for example, persons, districts, and political subdivisions chargeable with the support of the non compos during the term of commitment,[29] except where statute requires it.[30]

§ 159. Hearing

Third. There must be some form of judicial procedure, in the course of which the alleged non compos has the opportunity to appear, either personally or through representatives, and be heard as to his sanity vel non;[31] and it has been repeatedly held

[26] Corcoran v. Jerrel, 185 Iowa, 532, 170 N. W. 776, 2 A. L. R. 1579.

[27] In re Lambert, 134 Cal. 626, 66 P. 851, 55 L. R. A. 857, 86 Am. St. Rep. 296; Decennial and Other Key No. Digests, Insane Persons, ⟸13.

[28] In re Allen, 82 Vt. 365, 73 A. 1078, 26 L. R. A. (N. S.) 232.

[29] Merrimack County v. Concord, 39 N. H. 213; Juniata v. Overseers of Poor of Mifflintown, 22 Pa. Super. Ct. 187.

[30] Ex parte Roberts, 202 Mass. 536, 88 N. E. 927.

[31] Allgor v. New Jersey State Hospital, 80 N. J. Eq. 386, 84 A. 711.

that statutes prescribing the form of such hearings, which ignore or unreasonably restrict this right, are unconstitutional and void, as tending to deprive the individual of his liberty without due process of law.[32] Subject to this requirement, the form of proceeding incident to commitment has no prescribed course, but is usually fixed by the statutes of the several states and differs in the respective jurisdictions. Failure to substantially comply with the requirements of such statutes has been held to so far avoid the commitment as to render it open to collateral attack,[33] where the jurisdiction does not appear on the face of the record and the court is one of limited jurisdiction.[34]

§ 160. Jury—Right to

In some of the states the right to have a jury pass upon the question of his sanity is given the alleged non compos by express statutory provision;[35] but, in the absence of such statute, a jury trial on the question of sanity preliminary to commitment is not a matter of right, and a denial of a jury trial in such a case will not render the proceeding objectionable, as being in conflict with the constitutional requirements as to due process of law.[36] Indeed, in the Pennsylvania courts it seems to be held that, even after a jury has passed upon the question and found the person to be insane, it nevertheless remains a question for the court to decide whether such person shall be committed to

[32] Black, Const. Law, 399; 16 Am. & Eng. Enc. Law, p. 599(6); Re Boyett, 136 N. C. 415, 48 S. E. 798, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729; In re Allen, 82 Vt. 365, 73 A. 1078, 26 L. R. A. (N. S.) 233; Doyle, Petitioner (In re Gannon) 16 R. I. 537, 18 A. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759.

[33] Inhabitants of Kittery v. Dixon, 96 Me. 368, 52 A. 799.

[34] Evans v. Johnson, 39 W. Va. 299, 19 S. E. 623, 23 L. R. A. 737, 45 Am. St. Rep. 912.

[35] State v. Billings, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. Rep. 525; State v. Third Judicial District Court, 17 Mont. 411, 43 P. 385; Vernon's Ann. Civ. St. Tex. 1925, art. 4270.

[36] In re Boyett, 136 N. C. 415, 48 S. E. 798, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729.

the asylum.[37] The basis for the different rules applied to proceedings looking to a mere commitment and a proceeding de lunatico inquirendo as preliminary to the appointment of a guardian or committee is the fact that the former proceeding is one in the nature of a police regulation for public safety, which is more or less temporary in its effect, while the latter is for the supposed protection of the rights of the alleged non compos, as well as that of the public, deals with private rights in the main, and is more or less permanent in its effect. Hence, more formality is required in the latter than in the former proceeding.

§ 161. Certificate of physicians

In some of the states, the certificate of one or more reputable physicians, certifying to the fact of the unsound mental condition of the alleged non compos, is required as a condition precedent to the commitment of such person to an asylum.[38] The form and method of making the certificate varies in response to the requirements of the different statutes; but it usually consists of a written statement, made by an accredited physician or alienist, to the effect that he, or they, if more than one, have examined the person alleged to be insane, or are cognizant of his mental condition, and that he is so mentally deranged as to require his present commitment to the asylum.

§ 162. Nature of certificate

The exact force and purpose of such certificate is not always clear. Where the mere statement contained in the certificate, without further judicial procedure or hearing, is sought to be made the authority for the commitment of an alleged non compos to an asylum, the objectionableness of the procedure, as being

[37] Com. v. Kirkbride, 2 Brewst. (Pa.) 400.

[38] In re Cross' Commission, 16 R. I. 771, 19 A. 817; Washer v. Slater, 67 App. Div. 385, 73 N. Y. S. 425; Frey v. Barr, 28 Pa. Dist. R. 570; Inhabitants of Kittery v. Dixon, 96 Me. 368, 52 A. 799. Vernon's Ann. Civ. St. Tex. 1925, art. 3193a.

without due process of law, is evident; for the liberty of the person alleged to be insane is made to depend arbitrarily upon the will of another—i. e., upon that of the physicians making the certificate—and the alleged non compos is cut off from all right of being heard in his own behalf, and of appearing and contesting the right and wrong of the finding. We would suggest that, at most, such certificate should only have the force of a warrant for the temporary restraint of such person until such time as a more formal hearing can be had. Where the physicians making the certificate sit as a committee, or rather in the nature of a special jury, in connection with or under the supervision of a proper court, and render their opinion in the nature of a finding, or verdict, as the result of a proper hearing and fair examination of the alleged non compos, there is little, if any, objection to such procedure, inasmuch as such experts give the court the benefit of their scientific knowledge, being for that reason much more likely to reach a correct verdict than a jury of laymen, and the final decision is left in the breast of the court.[39] But, where the commitment is based upon an arbitrary statement of physicians or alienists, without judicial sanction or supervision, the proceeding would be contrary to the well-recognized principles of constitutional law, and would, as we have suggested above, only have the effect of a complaint or similar proceeding, serving as a basis for a restraining order until such time as a proper judicial hearing can be had, and would at all times be reviewable under a writ of habeas corpus, in connection with which the propriety of the commitment could be judicially inquired into.[40] After a finding that the alleged non compos is in fact sane, he cannot, of course, be longer restrained.[41]

[39] Grinky v. Wayne Probate Judge, 137 Mich. 49, 100 N. W. 171; Grinky v. Wayne Probate Judge, 137 Mich. 49, 100 N. W. 171, 11 Detroit Leg. N. 177.

[40] In re Boyett, 136 N. C. 415, 48 S. E. 798, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729.

[41] In re Cross' Commission, 16 R. I. 771, 19 A. 817.

§ 163. Appeal and review

Stated as a general rule, an order committing one to an asylum is not appealable, unless made so by statute;[42] but the same end can usually be attained by a writ of habeas corpus, sued out against the authorities purporting to hold the non compos under the commitment, and from an adverse decision on such hearing an appeal can be taken to the higher court. The same end can also frequently be reached by certiorari proceedings.[43] But it seems to be held that such an order of commitment cannot be questioned in collateral proceedings, where the order is regular on its face and the court making it had jurisdiction.[44]

§ 164. Effect of order

As the purpose and end of an order of commitment is not so much to fix the status of the person with reference to whom it is made, as to determine the present propriety or necessity of his commitment to an asylum, either for care, for treatment, or for restraint, such order is not considered as establishing such person's insanity further than necessary for the purpose in hand, and has not the force and effect of a regular inquisition.[45] Indeed, it is somewhat uncertain whether such a commitment will in any way affect the status of the person committed, except in a very limited way,[46] and, even where it raises a presumption of

[42] Sparrow v. Ingham Circuit Judge, 109 Mich. 272, 67 N. W. 112; In re Brickway, 80 Pa. 65; People v. Gilbert, 115 Ill. 59, 3 N. E. 744; Matter of Perkins, 105 Misc. Rep. 534, 173 N. Y. S. 520; Glenn v. State, 48 Tex. Civ. 229, 107 S. W. 621; People v. Gilbert, 115 Ill. 59, 3 N. E. 744; In re Sneddon, 74 Or. 586, 144 P. 676.

[43] Painter v. Painter, 206 Mo. App. 312, 228 S. W. 538.

[44] Ex parte Lewis, 11 Cal. App. 530, 105 P. 774.

[45] Wagener v. Harriott, 20 Abb. N. C. 283; Leinss v. Weiss, 33 Ind. App. 344, 71 N. E. 254; Karnes v. Johnston, 58 W. Va. 595, 52 S. E. 658; Walker v. Coates, 5 Kan. App. 209, 47 P. 158; Knox v. Haug, 48 Minn. 58, 50 N. W. 934.

[46] Knox v. Haug, 48 Minn. 58, 50 N. W. 934; Graber v. Spare, 16 Dist. Rep. 413.

insanity, the presumption may be freely rebutted by competent evidence.[47] However, as we have noted, the presumption of law is with the judgment, where collaterally attacked and it appears the court had jurisdiction.[48]

§ 165. Discharge and release

The commitment of a person to an asylum or hospital for the treatment of the insane is predicated upon the necessity arising out of the person's insane condition. Upon the recovery of the non compos, the necessity for his confinement of course ceases, and with it also ceases all reason for the commitment, and such person is then entitled to an immediate discharge,[49] or a trial and release enforced by mandamus.[50] Just how complete the recovery must be cannot be measured by fixed rules, and must lie largely within the discretion of the authorities charged with the duty of passing upon his fitness for a discharge.[51] The determining feature should be the question of whether or not the non compos has sufficiently recovered his reason to render his detention no longer necessary, either from the standpoint of his own or the public's welfare.[52] In the absence of a statute fixing a contrary rule,[53] a total recovery of reason is unnecessary, so

[47] Mutual Life Ins. Co. of New York v. Wiswell, 56 Kan. 765, 44 P. 996, 35 L. R. A. 258; Breedlove v. Bundy, 96 Ind. 319.

[48] Ex parte Lewis, 11 Cal. App. 530, 105 P. 774; Central State Hospital v. Foley, 171 Ky. 616, 188 S. W. 752; Matter of Prentice, 110 Misc. Rep. 456, 181 N. Y. S. 679.

[49] In re Hannah, 76 N. J. Eq. 237, 73 A. 849; Statham v. Blackford, 89 Va. 771, 17 S. E. 233.

[50] Statham v. Blackford, 89 Va. 771, 17 S. E. 233; Com. v. Kirkbride, 3 Brewst. (Pa.) 393; In re Thorpe, 64 Vt. 398, 24 A. 991; Gardner v. Jones, 126 Cal. 614, 59 P. 126.

[51] Emery v. Littlejohn, 83 Wash. 334, 145 P. 423; Ann. Cas. 1915D, 767, Byers v. Solier, 16 Wyo. 232, 93 P. 59, 14 L. R. A. (N. S.) 468.

[52] Austin W. Jones Co. v. State, 122 Me. 214, 119 A. 577.

[53] Sherman, Petitioner, 17 R. I. 356, 22 A. 276.

long as the recovery had is sufficient to make the commitment no longer necessary from a practical standpoint.[54]

§ 166. Necessity for provision for discharge

Consequently, in connection with commitment to an asylum, there must be provision for discharge therefrom upon proper judicial hearing. This is for the reason that the courts of the land are agencies of sovereignty, always open to the petition of the citizen, and any person who thinks himself aggrieved has or should have it within his power to initiate proceedings for his relief. This principle applies to persons confined in asylums as well as to other classes of citizens, especially with reference to the propriety of their confinement, and the courts have uniformly held that statutes which deny to such persons this right of appeal to some judicial tribunal to test their right to a discharge are unconstitutional and void, as being an attempt to restrain the individual without due process of law, or else deny to them the equal protection of the law. For instance, it is held that a statute providing for detention until discharged by a committee appointed by a justice of the Supreme Court is subject to this objection,[55] and that the same is true of a statute which provides that a person so committed to an asylum can only be discharged by an act of the Legislature.[56] It is readily apparent that such means of discharge takes the matter from out of the supervision of the courts, and that action thereunder could not be readily initiated at the instance of the non compos. It is therefore held that in such cases a writ of habeas corpus will lie to bring the non compos before the court for an inquiry into the propriety of his further detention and without reference to the restrictions

[54] In re Brush, 3 Abb. N. C. (N. Y.) 225; Byers v. Solier, 16 Wyo. 232, 93 P. 59, 14 L. R. A. (N. S.) 468.

[55] Doyle, Petitioner (In re Gannon) 16 R. I. 537, 18 A. 159, 5 L. R. A. 359, 27 Am. St. Rep. 759; In re Boyett, 136 N. C. 415, 48 S. E. 798, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729.

[56] Re Boyett, 136 N. C. 415, 48 S. E. 798, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729.

of the statute. A like instance is presented where a statute provides that a person who has been committed to an asylum after having been acquitted of crime on the grounds of insanity could only be discharged by the Governor upon the certificate of the judge where the acquittal was had and of the medical superviser of the asylum to the effect that the prisoner had recovered his reason, and that this should be based on an examination made by them after being summoned by the prison inspectors. Such a statute was held unconstitutional,[57] because, first, it failed to furnish reasonable means for enforcing the remedy; and, second, because the contemplated inquiry would be ex parte and at the will of the prison inspectors, who alone could set it in motion. However, the chief objection would seem to be that the liberty of the person alleged to be insane was made to depend upon the will of another individual, and no means were permitted such person to enforce an impartial hearing on the question of his sanity.

§ 167. Notice of discharge

It would seem, also, that a proceeding to discharge a person committed to an asylum should not be instituted without proper notice to persons, other than the non compos, who might be interested in the matter of his commitment. For example, where such person is under guardianship, it would seem that the guardian should regularly be notified of the contemplated hearing, looking to a discharge.[58] The reason for this is that free opportunity should be given to all persons interested to show the propriety of the confinement and undesirability of the discharge; otherwise, there being no one to oppose the discharge, the hearing might not develop the true condition of the person's mind or the extent of his recovery, and the non compos might be erroneously discharged, because of the absence of some one to present proper objections to the same.

[57] Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633.

[58] Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665.

In this connection it is held that such a person applying for discharge is entitled to counsel to aid him, and that the fees for the same may be considered necessaries and charged against such person's estate or against those liable for his support.[59]

§ 168. Effect of discharge

Since the commitment of a person to an asylum is predicated upon the insanity of such person, his subsequent discharge carries with it the assumption that he has so far recovered as to render his restraint and treatment no longer necessary or desirable, and is prima facie evidence of his restoration to sanity.[60] It is therefore held that, where a statute provides for the discharge of an inmate by the authorities of an asylum, such discharge of a person so confined will operate to restore him to the status of a sane person, notwithstanding the judgment of lunacy entered at the time of his commitment.[61]

§ 169. Form of proceedings incident to discharge—Under statute

The procedure incident to the discharge of a person confined in an asylum is in most cases provided for by the statutes of the several states. The fitness of such a one for discharge is usually placed in the discretion of some official, or committee of officials, connected with the institution, and this would seem to be constitutional, so long as the action of such person, or persons, in passing on the fitness for discharge, is subject to the review of the courts, and such actions can be initiated by the non compos or his friends and relations;[62] but where such discharge is made

[59] Carr v. Anderson, 154 Minn. 162, 191 N. W. 407, 26 A. L. R. 557; Re Freshour's Estate, 174 Mich. 114, 140 N. W. 517, 45 L. R. A. (N. S.) 67, Ann. Cas. 1915A, 726.

[60] Kellog v. Cochran, 87 Cal. 193, 25 P. 677, 12 L. R. A. 104; Matter of Balch, 93 Misc. Rep. 419, 156 N. Y. S. 1006.

[61] Kellog v. Cochran, 87 Cal. 192, 25 P. 677, 12 L. R. A. 104.

[62] Decennial and other Key No. Digests, Insane Persons, ⟸51, 32 C. J. 684; In re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729.

to depend finally upon the discretion or will of any agency other than the courts, it will be objectionable, and any statute providing for it will be unconstitutional.[63] Examples of this have already been noted supra.[64]

§ 170. By habeas corpus

In addition to the means provided by statute for seeking a discharge from an asylum, the propriety of such a discharge can usually be inquired into by habeas corpus proceedings. Here, as in other cases where one is unlawfully restrained of his liberty, this writ will serve to bring the alleged non compos before the court, where the justness and legality of his confinement can be inquired into. In such case, the court to which the writ is returnable may enter into an inquiry as to the relator's sanity, as well as inquire into the regularity of the commitment under which he is being held, and may discharge him from custody, where justice so demands; the burden being upon the relator to show that he is entitled to a discharge.[65] Where the claimed recovery of the non compos is the basis for the writ, the court will usually inquire into the state of the person's sanity, and act as the facts demand; but, where the irregularity of the retention is the basis for the writ, the court will usually, where the proceedings are found to be irregular, remand the relator to the proper authorities, so that inquiry can be regularly made into his sanity by the agency provided by statute or otherwise.

[63] In re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729.

[64] See supra, § 166.

[65] In re Thorpe, 64 Vt. 398, 24 A. 991; People v. Lamb (Sup.) 118 N. Y. S. 389; Gardner v. Jones, 126 Cal. 614, 59 P. 126; Ex parte Palmer, 26 R. I. 486, 59 A. 746; In re Boyett, 136 N. C. 415, 48 N. E. 789, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729; Decennial and Other Key No. Digests, Habeas Corpus, ⇐85(1).

§ 171. Limitations of habeas corpus

There is some question whether habeas corpus proceedings will lie, where there is an adequate remedy provided by statute, under which the propriety of a person's right to a discharge from an asylum can be fully and fairly inquired into. It is contended that a habeas corpus proceeding is a summary remedy, called into being by the necessities arising from the absence of a legal or statutory method of securing substantial justice, and that it has no place where the law meets the ends of justice by the usual and ordinary methods. It has therefore been held that under such circumstances habeas corpus proceedings will not lie, and especially where statutory proceedings looking to the same end are pending.[66] On the other hand, the courts of some states have held that habeas corpus proceedings will lie, even during the pendency of other proceedings brought for the same purpose.[67] A definite general rule with reference to this question does not seem to have been established, but we suggest that it should be governed largely by the circumstances of each case. Where there is a statutory remedy, which is fair and adequate, the courts will likely leave the petitioner to pursue it; but where there is reasonable question of the adequacy or expediency of the statutory remedy, or whether it will give the relief sought, the courts will proceed under the writ.

§ 172. By mandamus proceedings

In addition to the two modes of discharge we have discussed as being in more general use in practice, it has been held that in proper cases a mandamus will lie to enforce the authorities of an asylum to discharge a recovered lunatic.[68] This proceeding is extraordinary in its nature, and has few precedents. However, we would suggest that it might be used to good effect in those

[66] Matter of Laurent, 11 Abb. N. C. (N. Y.) 120.
[67] In re Bresee, 82 Iowa, 573, 48 N. W. 991.
[68] Statham v. Blackford, 89 Va. 771, 17 S. E. 233.

instances where statutes have placed the institution of proceedings for discharge in the discretion of certain officials. As the placing of such power in any agency, where the alleged non compos cannot initiate proceedings looking to his discharge, is repugnant to our constitutional ideas, the courts will exercise their equity powers in assuming that such officials intended to bring about such discharge in proper cases, and enforce the same by its mandamus. By this method the initiative power and right to a speedy judicial hearing would be restored to the alleged non compos by his ability to institute the mandamus proceedings.

§ 173. Commitment under Texas statute

As space will not permit the discussion of the statutes of the several states regulating the admission of persons to public asylums, the statutes of Texas will be briefly discussed as an example of this class of statutes, and the practitioner is referred to the statutes of his own state for a local application of the principles discussed elsewhere.

(a) Persons subject to commitment

(1) The persons received at, or committed to, the Texas public insane asylums fall into two general classes: (a) Public patients; and (b) private patients. Public patients in turn fall into two general classes: (a) Temporary patients, or those committed for observation and for a limited time, either on certificate of physicians or on such certificate and an order of a county judge; and (b) permanent patients, or those committed on regular adjudication of insanity and for an indefinite time.

(b) Temporary patients

(2) Temporary patients are received either for five days or for thirty-five days. In the first case, a person may be received and detained for five days upon the certificate of two qualified and licensed physicians, showing that such person is afflicted with violent and dangerous insanity, or that there is some other

emergency requiring his detention, which certificate should be filed with the county judge. Any peace officer is required to arrest and deliver to the asylum such person, either upon the request of the person applying for his detention or upon the request of either of such physicians; and such applicant is required within five days to cause such alleged insane person to be regularly committed or discharged, under penalty of being liable for the expenses incurred.[69] In the second case, a person may be committed by the county judge to the asylum for thirty-five days upon the certificate of two licensed and duly qualified physicians that such person is in such a mental condition that his detention at the asylum is necessary for his proper care or observation. If such a person is found to be sane, he should be discharged by the superintendent of the asylum within thirty days and the discharge reported to the county judge committing him; but, if he be found to be insane, such superintendent should report that fact to such county judge, with the recommendation that he be regularly committed as an insane person, or else returned to the care of guardian or friends, where he is harmless and can be properly cared for. Within the thirty-five days, the county judge may surrender him to his guardian or friends, or he may regularly commit him to the asylum, if he deems the commitment to the asylum necessary. If, in this connection, the county judge desired additional medical testimony as to the person's sanity, he may appoint an additional physician to make a further examination and report back to him.[70]

(c) Permanent patients

(3) Permanent patients, or those committed to the asylum for an indefinite time, are usually committed after they have been regularly adjudged insane. The verified petition for commitment should be accompanied by a certificate of the insanity of such person made by two duly licensed and qualified physicians,

[69] Vernon's Ann. Civ. St. Tex. 1925, art. 3193f.
[70] Vernon's Ann. Civ. St. Tex. 1925, art. 3193e.

and by an order of the county judge directing such person's commitment and stating that he finds such person to be insane and a proper subject for treatment at the institution.[71]

(d) General provisions

(4) The order of commitment should show that a person so committed has been a resident for the last six months of the county from which he is committed, and that satisfactory arrangements have been made for his maintenance, or that his insane condition renders it dangerous for him to remain at large.[72] No physician is *qualified* to make the certificate incident to commitment, who is related to either the insane person or the person applying for the commitment, who is in any way financially interested in the asylum, or who is in any way connected with the institution as an officer, attending physician, etc.[73] Confinement for such insane persons in any place other than an asylum, especially jails and other places used for confining criminals, for a longer term than thirty days, is never allowed, except where no other suitable quarters are obtainable, the county health officer being charged with determining that fact; and, where he is so confined in an emergency, immediate arrangements should be made for his comfort and safety, and for medical examination and treatment. Also in such case immediate notice of such detention must be given to the state board of control by the county judge ordering his confinement.[74]

(e) Application and hearing

(5) Upon a verified application being made to a county judge for commitment of a person to an asylum, he may proceed to forthwith determine the insanity of such person, if no application has been made for a regular hearing or for a jury trial. If ei-

71 Vernon's Ann. Civ. St. Tex. 1925, arts. 3193, 3193a.
72 Vernon's Ann. Civ. St. Tex. 1925, art. 3193a.
73 Vernon's Ann. Civ. St. Tex. 1925, arts. 3193a, 3193b.
74 Vernon's Ann. Civ. St. Tex. 1925, art. 3193c.

ther the alleged insane person, any relative, or near friend demands a hearing, or the county judge of his own motion determine on such a hearing, the county judge should set a time for a hearing before himself of the application at any time within five days, copy of which order must be served on the persons interested in the application and on any others the judge may name; and on the day so named, or any subsequent day to which the hearing may have been properly adjourned, the court shall hear testimony offered by any of the parties, examine the alleged non compos, if deemed advisable, and render a written decision as to the person's sanity. The hearing may be held, either at the courthouse or at the place where the person is detained. If a jury is demanded by the alleged insane person, or any one interested in such person, or is determined upon by the court of his own motion, it must be granted as in other cases, and a warrant issued, directing the sheriff to summon a jury of six men, who shall hear the evidence and determine whether the alleged non compos is sane or insane.[75] If found sane, such person should be discharged; and, if found insane, the county judge should enter a judgment of lunacy and issue a warrant directing the delivery of the lunatic to the proper asylum. Where deemed necessary, special attendants may be provided for; and it is mandatory that a female be accompanied by a female, unless accompanied by her father, brother, husband, or son.[76]

§ 174. Commitment of private patients

(6) Private patients are of two classes: (a) On the request of a physician, health officer, or peace officer, the head of an asylum may receive for temporary care and treatment, not to exceed ten days, a person who is in immediate need of the same, because of mental derangement, delirium tremens, or drunkenness. Such request for admission must be in writing and filed at the institution within twenty-four hours after entry of the

[75] Vernon's Ann. Civ. St. Tex. 1925, art. 3193b.
[76] Vernon's Ann. Civ. St. Tex. 1925, art. 3193d.

patient. Patients unsuitable for such care must be removed on request, or liability for all expenses is incurred by the applicant. Such person will be examined by two licensed and qualified physicians, who will determine his mental condition, and either have him regularly committed or discharged within ten days, unless such person make request to remain as voluntary patient under the second class, viz.: (b) Any person who desires to submit himself for treatment in such institution for mental derangement may make application and be received as a private boarder; but such person may not be retained more than three days after such person has given written notice of intention or desire to leave.[77]

§ 175. Temporary discharge

(7) The head of the asylum may permit patients to leave in charge of guardians, relatives, or friends for a period of not over twelve months, but he must first see that a proper examination of such person's mental condition is made by one of the attendant physicians within forty-eight hours of such departure and that proper clothing and expense money is furnished him. Such guardian, etc., may be required to make designated reports of the patient's condition, and the person to whose care he is so delivered may terminate such leave and return him to the asylum without further orders of commitment; and to this end they may cause his arrest, and any peace officer, is required, on request of such parties, to arrest and return him. At expiration of such leave, an additional leave for like period of time may be granted. But leave is not granted to patients convicted of crime previous to their confinement in the asylum.[78]

§ 176. Discharge

Patients who have recovered their reason are ordinarily discharged from the asylum upon the recommendation of the superintendent of the institution, approved by the Board of Control.

[77] Vernon's Ann. Civ. St. Tex. 1925, arts. 3193g, 3193h.
[78] Vernon's Ann. Civ. St. Tex. 1925, arts. 3193i, 3193j.

This does not apply to patients charged with crime and committed under the Code of Criminal Procedure, as the latter can only be discharged upon the order of the court by which they are committed.[79]

§ 177. Enforcing discharge

Just what would be the remedy of the recovered inmate of the asylum, where the superintendent failed or refused to recommend his discharge, is not made clear by the statute. It is uncertain whether the provisions of articles 4282–4284,[80] outlining proceedings in the county court to procure the discharge of such a person from guardianship, will apply to persons confined in the asylum. It is likely, however, that upon the refusal of the superintendent to recommend the discharge of a patient, whose confinement in the asylum is no longer necessary, habeas corpus proceedings would lie.[81] It is also probable, from the decisions in the other states, that the superintendent might be forced to act by mandamus proceedings.[82]

§ 178. Right to reimbursement, in general

It is primarily the duty of the state to care for the insane within its borders, but, under statutory enactment, it may look for reimbursement to those chargeable with the insane person's support. The duty of the care and restraint of this class of persons rests upon the state, from the fact that it is extraordinary in its character, and such as should only be exercised by sovereignty, as we have seen supra,[83] and while some cases hold that this is true with reference to the support of such persons only when they

[79] See, also, ante, § 144; Ex parte Wilson, 67 Tex. Cr. R. 369, 149 S. W. 117.

[80] Vernon's Ann. Civ. St. Tex. 1925, arts. 4282–4284.

[81] Lee v. Elizabeth, P. & C. J. R. Co., 69 N. J. Law, 607, 55 A. 107; 29 C. J. 105. See supra, § 170.

[82] See supra, § 172.

[83] See supra, § 152.

are paupers having no means of support,[84] the weight of authority charges it with the duty of supporting and maintaining other classes of persons who have been committed to its charitable institutions.[85]

§ 179. From estate of non compos

Where the state has expended money in the restraint and care of a non compos at a public asylum or hospital for the insane, it may ordinarily look to the estate of such person for reimbursement.[86] This is, in a great many of the states, expressly provided for by statute. In the case of public asylums and hospitals, it would seem that the authorities in charge, however, may not refuse admission to patients because of the delinquency of those chargeable with their support, or having the administration of their estate, but should receive the non compos patient and institute an action against the proper parties, where authorized by statute, to enforce reimbursement.[87] Where statutes provide for reimbursement of the state out of the estate of the non compos, it has been held that this will admit of the appropriation to that purpose of a pension due to the non compos by the national government.[88] Where the non compos has an income from a trust estate, or possibly from other sources, this should be exhausted before the property belonging to his separate estate is sold and

84 Board of Chosen Freeholders of Camden County v. Ritson, 68 N. J. Law, 666, 54 A. 839; Thomas Estate, 24 Pa. Dist. 31.

85 State v. Colligan, 128 Iowa, 536, 104 N. W. 905; Board of Com'rs of Montgomery County v. Ristine, 124 Ind. 242, 24 N. E. 990, 8 L. R. A. 461; Oneida County v. Bartholomew, 82 Hun, 80, 31 N. Y. S. 106; Brown's Committee v. Western State Hospital, 110 Va. 321, 66 S. E. 48; Chariton County v. Hartman, 190 Mo. 71, 88 S. W. 617.

86 Richardson v. Stuesser, 25 Wis. 66, 103 N. W. 261, 69 L. R. A. 829, 4 Ann. Cas. 784; Franklin Tp. v. Pennsylvania State Lunatic Hospital, 30 Pa. 522; Watt v. Smith, 89 Cal. 602, 26 P. 1071; Lokey v. State (Tex. Civ. App.) 291 S. W. 966.

87 In re Danville Asylum, 29 Pa. Co. Ct. Rep. 122.

88 Western Kentucky Asylum v. White, 104 Ky. 751, 20 Ky. Law Rep. 904, 47 S. W. 864.

applied to this purpose.[89] The tendency of the decisions seems to be to give the claim of the state for reimbursement precedence over the claims of other creditors, even when their claims are prior in time to those of the state.[90]

§ 180. From relatives

There has been some question as to constitutionality of another class of statutes, which seek to give the state the right to look to the relatives of the non compos for reimbursement for the care and treatment of an insane person in a public asylum or hospital supported by taxation or public contribution. The contention of those who deny the constitutionality of such statutes is based on twofold grounds. It is contended in the first place that, where such institution is supported by taxation levied either by the county or state, the estate and relatives of the insane person will have contributed to it their pro rata part along with the other taxpayers. The obligation to support the institutions has thus been assumed and discharged by the taxpayers on behalf of the state, and no obligation would longer exist. Therefore no duty or obligation with reference to this extinguished obligation would longer remain on the part of the estate or relatives of the non compos or any one else. To require the estate or relatives, then, of such non compos patient, again to contribute to the same object would in effect amount to the levy of another and additional tax for the same object. This would amount to a double taxation, as the estate and relatives would have, as we have seen, already contributed along with the other taxpayers, and are now forced to assume the whole of the burden they have already contributed to, without even being given credit for that which they first contributed. Such a rule, it is contended, would force the taxpayers and the estate and relatives of the non compos patient to pay taxes for an object that, in fact, never existed,

[89] In re Reed, 160 N. Y. 702, 57 N. E. 1123.

[90] Adams v. Thomas, 81 N. C. 296; In re Vernon, 20 Can. Legal Notes, 309.

inasmuch as the estate and relatives of the respective inmates of the asylum would be charged with their maintenance, and there could be no necessity for taxes looking to the support of an institution that was self-supporting.

§ 181. Against estate—Limitation of rule

It is further contended that, inasmuch as the non compos patient is placed in the asylum without regard to the wishes of himself or those of his family and friends, it would hardly be in accordance with the spirit of the American Constitutions, guaranteeing to every man the equal protection of the law, to demand payment thrust, as it were, upon the obligator without consulting him, and, mayhap, even in direct opposition to his wishes. This second line of reasoning would, of course, only have force in case of public patients committed to the asylum by the authorities upon the application of some one other than those persons sought to be charged with their maintenance.

§ 182. Against relatives—Limitation of rule

The leading case in support of these views is that of Baldwin v. County of Douglas, decided by the Supreme Court of Nebraska.[91] In the course of its opinion the court says: "The husband has already * * * paid for the maintenance of the insane hospital [through payment of state and county taxes]. This was upon his property. If he is required to pay for the treatment of his wife, this payment is just as much a compulsory contribution to the maintenance of the * * * hospital as either of the others. It is, in fact, another form of taxation for the same purpose. The right to levy taxes can only be justified as being necessary for the performance of its function by the state. No tax can be legally levied for any purpose foreign to those functions, and even that far taxation is tolerated only from

[91] Baldwin v. Douglas County, 37 Neb. 283, 55 N. W. 875, 20 L. R. A. 850.

the necessities of the case. The collection of unnecessary revenue by the state is not taxation. It is robbery. The plaintiff in error has already paid his full proportion towards the maintenance of the insane asylum. More than that the authorities cannot constitutionally exact. * * * The statute which purports to authorize the recovery, from persons legally bound for the support of an insane person, of the sum paid by the county for the care and treatment of such insane person in the insane asylum of this state, when such care and treatment has been furnished upon the findings of the proper commissioners of the county, for the reasons stated, is in conflict with section 1, article 9, of the Constitution, and is therefore inoperative in so far as it purports to confer such right of action upon the county." [92] This view seems to be sustained by Mr. Bishop,[93] who states the rule in line with the above opinion.

§ 183. Constitutionality of statute

However, the logic of the Nebraska court in such case of Baldwin v. County of Douglas, supra, does not seem to have appealed to the courts generally, and the decided weight of authority tends to a different rule. The decisions on the point are not numerous, but the greater number of the more recent cases tend to hold that a statute providing for the reimbursement of the state or county out of the estate of a non compos patient, who is being cared for in a public asylum, or by persons legally chargeable with his support, will not be unconstitutional, either as double taxation or as class legislation.[94] Such an enforced contribution, under these decisions, will be considered merely as a reim-

[92] Board of Com'rs of Montgomery County v. Ristine, 124 Ind. 242, 24 N. E. 990, 8 L. R. A. 461.

[93] Board of Com'rs of Marshall County v. Burkey, 1 Ind. App. 571, 27 N. E. 1108.

[94] Bon Homme County v. Berndt, 15 S. D. 498, 90 N. W. 147; In re Yturburru's Estate, 134 Cal. 567, 66 P. 729; Decennial and Other Key No. Digests, Insane Persons, ⟸47, 58; State Commission in Lunacy v. Eldridge, 7 Cal. App. 298, 94 P. 597, 600.

bursement of the state or county for amounts advanced to meet an obligation resting primarily upon the estate of the non compos and those liable for his support, and that there is an implied agreement to refund such amount as in case of an individual who has furnished necessaries to the lunatic. Indeed, some cases go farther, and hold that such amount can be recovered by the state and county from the estate of the non compos and those liable for his support, without regard to whether the statute charges such estate or persons with such expense, or gives the authorities a right of action against the estate of the lunatic or the persons in question.[95] The argument in such cases is that, since there is an implied agreement on the part of the estate to reimburse one for necessaries furnished to the non compos, the same rule will apply to public authorities who furnish necessary care and support to him, and that no positive statute is necessary to put the rule into effect. In those states which do not go so far, it has been held in this connection that statutes giving to the state or county the right of seeking reimbursement out of the estate, or from the relations of the non compos, will not be given a retroactive effect, so far as to enable such authorities to recover for amounts spent, prior to its enactment, in maintaining patients.[96] But in this connection it has been held that a pension granted by the federal government cannot be applied by it to the maintenance of the recipient in one of its hospitals for the insane, subsequent to his discharge from military service.[97]

§ 184. As applied to relations generally

Whether statutes seeking to charge relations of an insane patient generally with the expense of maintaining him in a public asylum or hospital are enforceable is not well settled. While the courts of several states seem to hold that statutes of this char-

95 McNairy County v. McCoin et al., 101 Tenn. 81, 45 S. W. 1070, 41 L. R. A. 864.

96 Baker v. District of Columbia, 39 App. D. C. 42.

97 U. S. v. Frizzell, 19 App. D. C. 49.

acter are constitutional,[98] it is doubtful whether the force of such statutes will extend beyond those relations primarily liable for the support of such lunatic. The reason for this, we think, is evident. The liability, even when fixed by statute, must be predicated upon some implied duty resting upon the party sought to be charged, and for which the law implies a promise to pay. The statute cannot create a contract where none exists, but may only provide for the enforcement of an obligation which is already assumed to exist. For example, in the case of an insane wife, cared for in a public asylum, the obligation of the husband to reimburse the state or county for the money expended for her maintenance might be predicated upon the duty of the husband to support the wife, and from which the law implies a promise by the husband to pay for necessaries furnished her, and for the reasonable value of which she might under the common law bind him as his agent.[99] In the same manner, this might be true in cases where an insane minor is cared for in a public asylum, and the parents, especially the father, is sought to be charged by statute with his support.[1] Here, as in case of the husband and wife, there is a duty under the common law, resting upon the parent, to care for the minor, and upon this implied obligation,[2] the statutory obligation may be predicated. But there is no legal duty resting upon one to maintain all his indigent relations; a man's immediate family is all that can look to him for support. Indeed, it has been specifically held that this obligation cannot

[98] State Commission in Lunacy v. Eldridge, 7 Cal. App. 298, 94 P. 597, 600; Guthrie County v. Conrad, 133 Iowa, 171, 110 N. W. 454; McCook County v. Kammoss, 7 S. D. 558, 64 N. W. 1123, 31 L. R. A. 461, 58 Am. St. Rep. 854; Brown's Committee v. Western State Hospital, 110 Va. 321, 66 S. E. 48.

[99] Goodale v. Lawrence, 88 N. Y. 513, 42 Am. Rep. 259; Martin v. Beuter, 79 W. Va. 604, 91 S. E. 452, 4 A. L. R. 1106; St. Vincent's Inst. for Insane v. Davis, 129 Cal. 20, 61 P. 477.

[1] Guthrie County v. Conrad, 133 Iowa, 171, 110 N. W. 454; Inhabitants of Arlington v. Lyons, 131 Mass. 328.

[2] Bl. Com. "Chose" (2d Ed.) 155, with notes; Kent's Com. (12th Ed.) 146, 147.

be placed, except by express statute, upon children[3] or on brothers and sisters[4] of such non compos, inasmuch as there is no legal duty resting upon that class of relatives to provide for the non compos, however strong the moral obligation might be. In other words, we do not think a statute may point out and charge a designated class of persons with such an obligation, unless there is primarily some duty resting upon such person to discharge the same, and that a law attempting to charge all classes of relations with the support of an insane patient in a public asylum, without reference to such primary liability, will be objectionable as class legislation. It would have much the same legal aspect as a law requiring all bachelors to reimburse the state for the education of one or more indigent minor children being educated in the public schools.

§ 185. As to persons primarily liable

We therefore think, in the light of the various decisions on the subject, that the better rule would be that a statute may provide for the reimbursement of the state and county for the expenses of keeping insane persons in a public asylum or hospital, where such reimbursement is charged against the guardian or estate of the insane person, or against such of his relatives as are primarily liable for his support or for necessaries furnished him; and such a statute will not be objectionable as double taxation or class legislation. But where the statute goes further, and seeks to charge the relatives generally, or to charge relatives who are not primarily liable for such support, etc., the statute will be open to objection both as double taxation and as class legislation.[5]

[3] Richardson County v. Smith, 25 Neb. 767, 41 N. W. 774. Contra, McCook County v. Kimmoss, 7 S. D. 558, 64 N. W. 1123, 31 L. R. A. 461, 58 Am. St. Rep. 854.

[4] Richardson County v. Frederick, 24 Neb. 596, 39 N. W. 621; Decennial and Other Key No. Digests, Insane Persons, ⟸53.

[5] Luder's Adm'r v. State (Tex. Civ. App.) 152 S. W. 220; McNairy County v. McCoin, 101 Tenn. 74, 45 S. W. 1070, 41 L. R. A. 862; Goodale v. Lawrence, 88 N. Y. 513, 42 Am. Rep. 259; Inhabitants of

In this case, where the statute may charge persons, primarily liable, with the expense of maintaining the insane patient in the asylum, the claim which the authorities have for reimbursement is on the same basis as ordinary debts, and exempt property of persons sought to be charged cannot be subjected to its payment,[6] and such claims are not to be given preference over the claims of other creditors.[7]

§ 186. By services of non compos

The question has frequently arisen as to how far the authorities in charge of an asylum can avail themselves of the services of the inmates. Not only have the services of such persons been used in connection with the caring for the institution, but in some instances a revenue has been secured by using the services of the more rational of the inmates on the farms and in workshops connected with the institution. The rule in this respect would seem to be that, while private patients whose maintenance is provided for should be exempted, the state has the right to avail itself of the services of indigent patients, where such work will not be detrimental to their health.[8]

Hanover v. Turner, 14 Mass. 227, 7 Am. Dec. 203; Wertz v. Blair County, 66 Pa. 18; Ashland County Com'rs v. Directors of Richland County Infirmary, 7 Ohio St. 65, 70 Am. Dec. 49; Baldwin v. County of Douglas, 37 Neb. 283, 55 N. W. 875, 20 L. R. A. 850; Decennial and Other Key No. Digests, Insane Persons, ⟸52, 53 et seq.; Board of Com'rs of Montgomery County v. Ristine, 124 Ind. 242, 24 N. E. 990, 8 L. R. A. 461; Albany v. McNamara, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212.

[6] Central Kentucky Lunatic Asylum v. Craven, 98 Ky. 105, 32 S. W. 291, 56 Am. St. Rep. 323.

[7] In re Callen's Estate, 152 Cal. 769, 93 P. 1011; Matter of Taylor, 75 Misc. Rep. 157, 134 N. Y. S. 1120.

[8] Clough et al. v. Worsham et al., 32 Tex. Civ. App. 187, 74 S. W. 350.

§ 187. Care by individuals

While it may be true, as we have stated supra, that the state, in principle, at least, has assumed the position of the king under the common law as parens patriæ, and, as a consequence, becomes guardian of all insane persons within its borders, from a practical standpoint this is not true in all cases. There are many instances in which natural persons are called upon to stand in loco parentis to the non compos. This is chiefly in cases where the insane person is harmless in his demeanor and it is not necessary to confine him. When this is true, the obligation to care for him falls upon those chargeable with his support. In addition to the necessity of providing for the harmless insane, there is the further necessity of direction and control. Such a person is without mind, and there must of necessity be some normal mind to act for him in the management of his affairs, much as the parent is called upon to act for the child before it arrives at the age of maturity. Such a person, so legally authorized to act for the non compos, is variously known as curator, guardian, committee, etc., but perhaps the most general designation is that of guardian. Such guardians fall into two general classes, viz., natural guardians, and legal guardians. We will presently notice each of these classes.

§ 188. Restraint by individuals

We have noticed supra society's power to control insane persons within its jurisdiction.[9] The same power belongs to certain individuals in a more limited sense. Not only does it belong to guardians, natural and legal, but may belong to others as well, where they are brought into certain relations to the non compos. It rests upon the broad right of self-defense, and arises out of the necessity of the case, inasmuch as the right to restrain another who has become deranged may be as much a matter of necessity as to take another's life in defense of one's

[9] See supra, § 152.

own.[10] However, since this power is so extraordinary in itself, it may only be exercised with caution, and where the exigencies of the case require it, and the restraint will be justified when carried only so far as necessary to attain the end sought. To justify it, two things are necessary:

First. The person exercising the restraint must act in good faith and upon reasonable grounds, which seem to call for the action in question; for example, where the individual exercising the restraint acts upon the advice of a physician,[11] where the alleged deranged person has committed, or is threatening to commit, a breach of the peace,[12] or such person is led to believe, either from information he may have received, or from the acts and conduct of the non compos himself, that such restraint is reasonably necessary. While the earlier cases seem to place the responsibility of the person exercising the restraint on his good faith in acting on reasonable appearance of necessity for the restraint, the later cases deny this, and it is now held by weight of authority that an insane person may be restrained of his liberty by an individual, when not to do so would endanger his own life or that of another, but such right of restraint is limited to cases of actual insanity and immediate danger. Insanity which does not render the insane person dangerous to himself or others does not furnish an excuse for such restraint, and the person exercising such restraint must act on the actual facts, not on mere suspicions and beliefs, however good his intentions may be, and is responsible for errors in judgment in reference thereto.[13] Private persons exercising such restraint without the above necessity have repeatedly been held liable for illegal restraint in

[10] Look v. Dean, 108 Mass. 116, 11 Am. Rep. 323; Porter v. Ritch, 70 Conn. 235, 39 A. 169, 39 L. R. A. 353; Keleher v. Putnam, 60 N. H. 30, 49 Am. Rep. 304.

[11] Emmerich v. Thorley, 35 App. Div. 452, 54 N. Y. S. 791.

[12] Paetz v. Dain, Wils. (Ind.) 148.

[13] Maxwell v. Maxwell, 189 Iowa, 7, 177 N. W. 541, 10 A. L. R. 482; Crawford v. Brown, 321 Ill. 305, 151 N. E. 911, 45 A. L. R. 1457.

actions for damages.[14] Restraint of this character is said to be governed by rules similar to those governing the arrest of persons without warrant of arrest.[15] Of course, where the person restraining such other on these grounds has indeed acted in bad faith, or in reckless disregard of the other's rights, he will be liable for the unlawful detention, either in an action for false imprisonment, malicious prosecution, or for conspiracy.[16]

§ 189. Liability for illegal restraint

Second. A person attempting to restrain another because of his deranged mental condition must act with reasonable promptness in ascertaining such other's true mental condition, and in taking the proper legal steps for his further detention when such further restraint is necessary. While in matters of this nature it may be necessary for one to act promptly and without taking time to proceed through the prescribed legal channels, yet, after the need of the moment has been met, a person exercising such restraint should proceed by due process of law, where the rights of the alleged non compos can be duly protected by the safeguards legal procedure has thrown around him.[17] Not only may the principal, who restrains an alleged non compos, under circumstances which do not justify the detention, become liable for the resulting damage, but the same liability may fasten upon one who participates with or aids such person in the unlawful detention of the alleged non compos.[18] But such a one must be an

[14] Zinkhan v. District of Columbia, 50 App. D. C. 312, 271 F. 542; Witte v. Haben, 131 Minn. 71, 154 N. W. 662, L. R. A. 1916C, 228, Ann. Cas. 1917D, 534.

[15] Paetz v. Dain, Wils. (Ind.) 148; 25 C. J. 471, and notes.

[16] Seeger v. Pfeifer, 35 Ind. 13; Hurlehy v. Martine, 56 Hun, 648, 10 N. Y. S. 92; Roth v. Smith, 41 Ill. 314; Com. v. Sheriff, 8 Phila. (Pa.) 645.

[17] Brookshaw v. Hopkins, Lofft, 240; Colby v. Jackson, 12 N. H. 526.

[18] Boesch v. Kick, 97 N. J. Law, 92, 116 A. 796; Bacon v. Bacon, 76 Miss. 458, 24 So. 968.

actual participant; i. e., he must have in mind the intentional consummation of the end towards which the principal is working. Therefore it is held that one who hires his conveyance to such principal to convey the alleged non compos to the place of confinement will not be liable jointly with such principal for the wrongful detention of the alleged insane person.[19] The purpose of such party in letting the use of his team was to secure the hire therefor, and was not to secure the illegal detention of the alleged non compos.

§ 190. Natural guardians

Natural guardians are those who, from their natural relation to the non compos person, logically assume a position of protectorate over him. The spouse, parents, children, grandchildren and grandparents, brothers and sisters, in the order named, are generally considered the natural guardians of such demented persons.[20] They are also usually those persons who are charged under the statute or common law with the support of such non compos, and it is in this connection that they usually appear before the courts. They are ordinarily entitled to the custody and control of the non compos, in the absence of some regularly appointed legal guardian.

§ 191. Guardian by force of contract

There is another condition that is closely analogous to this, viz., where one not necessarily related to the non compos is forced to assume the duties of a natural guardian by reason of his prior contractual relations. A person who has undertaken to provide and care for a person must continue to do so after such person becomes insane, and will not be allowed to throw

19 Williams v. Williams, 4 Thomp. & C. (N. Y.) 251.

20 Coleman v. Commissioners of Lunatic Asylum, 6 B. Mon. (Ky.) 239; Drew's Appeal, 57 N. H. 181; Vernon's Ann. Civ. St. 1925, art. 4118 et seq.; Decennial and Other Key No. Digests, Insane Persons, ⚖53, 54.

such non compos person off, to become a charge on the community. Thus it has been held that a person who, for a stated amount, has contracted to care for a child during its natural life, may not, upon such child becoming insane, place it in an asylum for paupers, but must provide a proper place for its care and restraint.[21]

§ 192. Power and authority of natural guardians

In the absence of a legal guardian, the powers of a natural guardian are similar to those of parent over child. He has the power of reasonable restraint, without which, of course, his office would likely be vain. As corollary to this, such natural guardians have the right to the possession of the non compos free from interference from third parties; for example, it has been held in this connection that the wife will have a right to the possession of the person of the non compos husband as against his parents. Similarly, the parent would have such right as against collateral relations; and other relations would have prior rights in the order of their nearness of relationship to the non compos.[22]

§ 193. Natural guardian's control over property

The control of such natural guardian over the property and effects of the non compos is much more restricted than the control over his person. While the natural guardian might have the right to use and administer such property for the ward's benefit; he would have no power to sell or otherwise dispose of it, or even recover it.[23]

[21] Van Cleave v. Clark, 118 Ind. 61, 20 N. E. 527, 3 L. R. A. 519.

[22] McKinnon v. First Nat. Bank of Pensacola, 77 Fla. 777, 82 So. 748, 6 A. L. R. 111; Simpkins, Adm. of Ests. p. 556; 12 R. C. L. 1105 et seq.

[23] Decennial and Other Key No. Digests, Guardian and Ward, ⟸ 4; 28 C. J. 1058.

§ 194. Legal guardian

A legal guardian, as we shall use the term, is one acting under appointment of the legal authority of the state, which has the power of appointment as a part of its sovereignty.[24] He is considered as an officer of the court of his appointment, charged with the active exercise of the sovereign power, and is at the same time a sort of artificial parent, or protector, appointed by the courts. Any competent person may be appointed to such position, in the absence of statutory restriction; but it is more usual to appoint the next of kin, where there is such.[25] For example, the husband is usually appointed guardian of the wife;[26] the wife, guardian of the husband;[27] the father, guardian of the child, etc.[28] But, while this is usual, it is not entirely obligatory, unless made so by statute,[29] and rests very largely within the sound discretion of the court making the appointment,[30] which will consult the best interests of the non compos in making the appointment.[31] In the case of a nonresident insane person, a nonresident may be appointed guardian to take over property within the state, if the best interests of the non compos seem to call for such appointment;[32] but, unless there appears to be

[24] In re Sall, 59 Wash. 539, 110 P. 32, 626, 140 Am. St. Rep. 885.

[25] Decennial and Other Key No. Digests, Insane Persons, ⊂ 33(1), 34; 32 C. J. 653, 692; Ziegler v. Bark, 121 Wis. 533, 99 N. W. 224; Schulmeyer v. McAllister, 171 Cal. 340, 153 P. 233; Baum v. Greenwald, 95 Miss. 765, 49 So. 836.

[26] Drew's Appeal, 57 N. H. 181.

[27] Robinson v. Frost, 54 Vt. 105, 41 Am. Rep. 835.

[28] Coleman v. Commissioners of Lunatic Asylum, 6 B. Mon. (Ky.) 239.

[29] Muse v. Muse, 76 Miss. 372, 24 So. 168; In re Page, 7 Daly (N. Y.) 155, 56 How. Prac. 100; In re Fegan, 45 Cal. 176.

[30] In re Taylor, 9 Paige (N. Y.) 611.

[31] In re Cook, 53 Hun, 634, 6 N. Y. S. 720; In re Cooper, 105 App. Div. 449, 94 N. Y. S. 270.

[32] In re Bartelme, 34 Misc. Rep. 131, 69 N. Y. S. 468; Decennial and Other Key No. Digests, Guardian and Ward, ⊂ 167 et seq.

some special reason for the appointment of a nonresident, a resident of the forum will usually be given preference with reference to such appointment.[33] In making a choice of a guardian, the court will not only look to the best interests of the non compos, but will respect his wishes as far as consistent with his good.[34] Besides natural persons, who may be appointed to the position of guardian of insane persons, artificial persons, such as trust companies and corporations, may assume that position, where their articles of incorporation contemplate it and their acting as such is not forbidden by statute.[35] Legal guardians may be appointed for either the person or estate, or both, of the non compos, as circumstances may require, and, of course, their authority is limited to the purpose of their appointment.[36]

§ 195. Appointment and qualification, generally

The procedure incident to the appointment and qualification of guardians is usually laid down clearly in the statutes of the respective states, and the practitioner is referred to the statutes of his state. The procedure is controlled by rules very similar to those relating to inquisition and commitment of lunatics, such as notice, hearings, etc., into which we have fully gone supra.[37] In addition, two requirements are common to practically all the procedures under statutes: (1) Before entering upon his duties as guardian, he is required to take an oath of office binding himself to a faithful and impartial performance of his duties as guardian.[38] (2) He must give bond, in an amount fixed either

[33] Morgan's Case, 3 Bland (Md.) 332.

[34] In re Cooper, 105 App. Div. 449, 94 N. Y. S. 270.

[35] Equitable Trust Co. v. Garis, 190 Pa. 544, 42 A. 1022, 44 Wkly. Notes Cas. 41, 70 Am. St. Rep. 644.

[36] In re Colvin, 3 Md. Ch. 278; Heckman v. Adams, 50 Ohio St. 305, 34 N. E. 155; Easley v. Bone, 39 Mo. App. 388; In re Burr, 17 Barb. (N. Y.) 9; In re Bassett, 68 Mich. 348, 36 N. W. 97; Shelby v. Farve, 33 Okl. 651, 126 P. 764.

[37] See supra, § 126 et seq.

[38] In re Rochon, 15 La. Ann. 6; Decennial and Other Key No. Digests, Insane Persons, ⟸33, 35.

by statute or the court, conditioned upon the proper discharge of his guardianship.[39]

§ 196. Under Texas statute

A fair example of the usual procedure is found in the Texas statute. The jurisdiction for the appointment of such guardian is placed in the county court having jurisdiction of the estate of such non compos, and it is made the duty of such court, where the non compos is adjudged insane, and without further notice, to appoint a guardian of the person and estate of such non compos in the same manner as in the case of minors.[40] This belongs to the county court of the county of the lunatic's residence at the time of the inquisition; and the jurisdiction will remain in that court, though the lunatic has been transported to an asylum in another county and is actually living there.[41] The residence of an insane married woman is that of her husband; and, where he has changed his residence during the time she is confined in the asylum, the county court of the county to which he removes will take charge of her guardianship.[42] The further procedure is outlined supra under the head of Inquisition in Texas.[43]

§ 197. Extent of insanity required

Of course, the necessary degree of mental incompetency is a prerequisite to the appointment of a guardian. Guardianship is founded upon the necessity arising out of the helpless condition of the ward, by reason of his mental deficiency. Hence the degree of insanity calling for the appointment of a guardian is usually measured by the ability of the alleged insane person to act for himself. It is therefore the general rule that the appointment of a guardian is justified only where a person is so mentally

[39] In re Franks, 2 Russ. 450, 38 Eng. Reprint, 405.

[40] Rev. St. Tex. 1925, art. 4272; Texas & P. R. Co. v. Baily, 83 Tex. 19, 18 S. W. 481.

[41] Flynn v. Hancock, 35 Tex. Civ. App. 395, 80 S. W. 245.

[42] Schwartz v. West, 37 Tex. Civ. App. 136, 84 S. W. 282.

[43] See supra, § 143.

unsound, either from disease, weakness, or great age, that he is incapable of intelligently conducting the ordinary affairs of life.[44] The reason advanced is that the non compos, being mentally unable to properly conduct his affairs, is as fully open to imposition on the part of the vicious, or injury from his own folly, as if he were totally insane. Hence it is unnecessary, for the purpose of such appointment, for him to be an idiot or lunatic, in the strict or technical sense of the term, unless otherwise provided by statute.[45] In a majority of the states it is held that such person must be shown to be insane before a guardian can be appointed for him; and in some jurisdictions it would seem that such a one must be adjudged insane before a guardian can be appointed for him. The rule is usually based upon and controlled by the wording of local statutes.[46] But, while statutes of a number of states require that there be an adjudication of incompetency as a condition precedent to the appointment of a guardian,[47] it has been held that a finding that such person is "mentally incapable," [48] or "mentally unsound," [49] would satisfy the requirement, except possibly in those states whose statutes require a showing of actual idiocy or lunacy, or some other degree of mental unsoundness, before the appointment of a guard-

44 Decennial and Other Key No. Digests, Insane Persons, ⟸ 30; 32 C. J. 630; Emerick v. Emerick, 83 Iowa, 411; 49 N. W. 1017, 13 L. R. A. 757; In Matter of Barker, 2 Johns. Ch. (N. Y.) 232; McCammon v. Cunningham, 108 Ind. 545, 9 N. E. 455; Griffin v. Collins, 122 Ga. 102, 49 S. E. 827; In re Wetmore, 6 Wash. 271, 33 P. 615.

45 Jackson v. Jackson, 37 Hun (N. Y.) 306; In re Streiff, 119 Wis. 566, 97 N. W. 189, 100 Am. St. Rep. 903; McCammon v. Cunningham, 108 Ind. 545, 9 N. E. 455; Appeal of Wentz, 76 Conn. 405, 56 A. 625.

46 Coon v. Cook, 6 Ind. 268; Martin v. Stewart, 67 Kan. 424, 73 P. 107; Com. v. Reeves, 140 Pa. 258, 21 A. 315; Fairfield, Overseers of Poor of, v. Gullifer, 49 Me. 360, 77 Am. Dec. 265; Ward v. Compton (Tex. Civ. App.) 203 S. W. 129.

47 Decennial and Other Key No. Digests, Insane Persons, ⟸ 33(1), 22 Cyc. 1139, note 821. See cases, 32 C. J. 653, note 53.

48 In re Leonard's Estate, 95 Mich. 295, 54 N. W. 1082.

49 Craft v. Simon, 118 Ala. 625, 24 So. 380.

ian can be made. It may even be presumed where the record is silent on the subject.[50]

It would seem, then, that the difference is not so much in the degree of derangement or mental weakness as a determination to give a proper legal hearing to the alleged non compos before his civil rights can be limited by a guardianship. This is also seen in the reason usually assigned as the basis for the rule requiring such adjudication of insanity, viz., that the fundamental principles of the common law forbid the depriving of the individual of his liberty, or the unreasonable curtailment thereof, except by judgment of a court of competent jurisdiction; otherwise, one might be arbitrarily deprived of control over his affairs at the caprice of rapacious and unprincipled relatives and acquaintances. In this connection, it has been held that the fact that a person is married will be no reason for not appointing a guardian for him, or her, where the impropriety of such appointment is not otherwise shown.[51]

§ 198. Effect of appointment, generally

As noticed elsewhere, the appointment of a guardian in this connection is called for by the helpless condition of the non compos ward, and his incapacity to act for himself in matters requiring the exercise of reason. Being without rational mind himself, his own safety and that of the public at large require that this deficiency be applied by the subjecting of his actions to the control and direction of some normal mind. Therefore, when the appointment is made, the mind and will of the guardian supplants that of the insane ward, within the scope of the authority conferred by the court making the appointment, and the ward is without further power to act with reference to such matters.[52] This gives rise to the difference in the rules applying to transac-

[50] Guthrie v. Guthrie, 84 Iowa, 372, 51 N. W. 13.

[51] In re Fegan, 45 Cal. 179; Gardner v. Maroney, 95 Ill. 552.

[52] Anderson v. Anderson, 42 Vt. 350, 1 Am. Rep. 334; 32 C. J. 692; Decennial and Other Key No. Digests, Insane Persons, ⚖30, 40, 93.

tions had with insane persons before and after they are placed under guardianship; e. g., in the first instance such transactions are usually held to be voidable only, while in the second instance they may be void. This will be more fully seen by reference to the portion of this work which deals with such transactions.

§ 199. Limitations of guardian's powers

The power and authority of the guardian of a non compos person is limited to the purpose of his appointment. The guardian, as we have seen, is an officer of the court appointing him, and can do no act that does not properly emanate therefrom.[53] The power of assuming to act for such other is an attribute of sovereignty, and cannot ordinarily be exercised by an individual, except as he is an instrument through which the sovereign power is expressed. Hence, in the first place, the power of a guardian of an insane person is limited by the scope of authority—i. e., the jurisdiction—of the court appointing him. Courts are themselves but agencies of sovereignty and as such are limited to the powers delegated to them by statute. Therefore the powers of a guardian are limited to such powers as are conferred by statute then in force, either on the appointing court or directly on himself by reason of such appointment.[54] As a result, the authority of such guardian is almost wholly dependent upon the local statutes of the state of his appoinment, and the practitioner is referred to the statutes of his state, which should be read in connection with the general rules herein discussed and relating to such powers.

[53] Cooper v. Wallace, 55 N. J. Eq. 192, 36 A. 575; Shaffer v. List, 114 Pa. 486, 7 A. 80; Moore v. Hanscom, 101 Tex. 293, 106 S. W. 876; Hayward v. Hayward, 65 Ind. App. 440, 115 N. E. 966; Matter of Hopper, 5 Paige (N. Y.) 489.

[54] Decennial and Other Key No. Digests, Insane Persons, ⇐ 65, 69, 70; In re Breslin's Estate, 135 Cal. 21, 66 P. 962; Kelly v. Kelly, 72 Minn. 19, 74 N. W. 899; Appeal of Johnson, 71 Conn. 590, 42 A. 662; In re Dowd, 19 Misc. Rep. 688, 44 N. Y. S. 1094; Andrus v. Blazzard, 23 Utah, 233, 63 P. 888, 54 L. R. A. 354.

§ 200. As to property rights, generally

Upon the appointment of a guardian for the estate of a non compos person, right of control over the property of such person passes ipso facto into the hands of such guardian, and the ward may no longer exercise any right of control or disposition over the same, except in a very limited way.[55] As such guardian is merely acting in the place of the non compos ward and for his benefit, interposing his own intelligence into the being of the non compos, as it were, he is without title or right in the property of the ward, further than necessary for the administration of affairs of such estate.[56] As he in effect steps into the shoes of the non compos, he may claim for his ward only such property rights as could be claimed by the ward himself, were he in his right mind. For example, if property is placed in trust for a person who subsequently becomes insane, and such person under the trust is to have a right to the income only, the guardian will be entitled to the control of the income,[57] but is not entitled to control of the corpus of the property itself,[58] for the reason that the non compos ward, even if in his right mind, would not be entitled to such right of control over the property.[59] In line with this same principle, it has been held that the appointment of a guardian will not ipso facto supersede a trustee holding funds for the benefit of the non compos ward, nor will the act of appointment alone operate to substitute the guardian for the trustee with reference to the control of the property so placed in trust.[60] Also, where the non compos could have exercised a

[55] Anderson v. Anderson, 42 Vt. 350, 1 Am. Rep. 334; Rankert v. Rankert, 105 App. Div. 37, 93 N. Y. S. 399; Equitable Trust Co. v. Garis, 190 Pa. 544, 42 A. 1022, 70 Am. St. Rep. 644.

[56] Cooper v. Wallace, 55 N. J. Eq. 192, 36 A. 575.

[57] Royer v. Meixel, 19 Pa. 240.

[58] In re Schwartz, 145 App. Div. 285, 130 N. Y. S. 74; Hancock's Estate, 12 Pa. Dist. 680.

[59] In re Wilson's Estate, 2 Pa. 325; Royer v. Meixel, 19 Pa. 240.

[60] Canady v. Hopkins, 7 Bush (Ky.) 108.

choice with reference to a matter involving his property rights, the guardian may do likewise. For example, such guardian may recall a promise which his ward could have recalled,[61] or he may take an election where the ward could have done so, if sane.[62] The relation between his guardian and the insane ward is said to be that of trustee and cestui que trust, rather than that of principal and agent,[63] and such guardian cannot bind his ward as agent, even as he has no authority outside of that given by the statute providing for his appointment.[64]

§ 201. Convey or incumber realty

As a general rule, courts have authority to authorize and direct the sale, incumbrance, and lease of real property by a guardian of an insane ward. However, such power is limited, first, to the prescribed powers of such court placed in it as an agency of sovereignty; and, second, by the fact that such power is limited in its exercise to cases tending to the proper administration and purpose of such guardianship.[65] For example: A court may decree the sale or incumbrance of an insane ward's property by his guardian for the support of such ward and his family, for the payment of the proper expenses of the administration, and for similar purposes necessary in the proper administration of such estate; but it would not be proper for such guardian, even under the direction of the court, to go out of the purposes of such administration and make such a conveyance or incumbrance of the estate for speculative purposes, for the purpose of in-

[61] Buhler v. Trombly, 139 Mich. 557, 102 N. W. 647.

[62] Fitzwilliams v. Davie, 18 Tex. Civ. 81, 43 S. W. 840; Kent v. Morrison, 153 Mass. 137, 26 N. E. 427, 25 Am. St. Rep. 616, 10 L. R. A. 756.

[63] McDonald v. Jarvis, 64 W. Va. 62, 60 S. E. 990, 131 Am. St. Rep. 889; Clarke v. Knight, 84 Fla. 468, 94 So. 665.

[64] Grove v. Reynolds, 100 Mo. App. 56, 71 S. W. 1103.

[65] Cooper v. Wallace, 55 N. J. Eq. 192, 36 A. 575; Kelsey v. Trisler, 32 Tex. Civ. App. 177, 74 S. W. 64; Berry v. Rogers, 2 B. Mon. (Ky.) 308; Matter of Heller, 3 Paige (N. Y.) 199; Decennial and Other Key No. Digests, Insane Persons, ⇐63–69.

vestment, for the purpose of discharging trusts imposed upon the non compos with reference to the property of another, or even, it is said, for the payment of debts due by the non compos, except where the immediate payment of such debts is necessary for the preservation of the insane person's estate.[66]

§ 202. Requirements

Even in cases where the court has authority, a further limitation is laid upon the guardian's power in this respect. As a general rule, a guardian of an insane person may not alienate, incumber, or lease the real property of his insane ward except by the express authority of the court of his appointment, unless authorized by statute. This is for the reason that such guardian, as a special officer of the court appointing him, has no power except as derived therefrom. The rule applies with special force to real estate,[67] and is extended to mineral leases.[68] As corollary to the above, it is generally held that a nonresident guardian, acting under the orders of the courts of one state, has no power to dispose of realty in another state, in which he has not qualified as guardian, inasmuch as the powers of a court to affect realty do not extend beyond the borders of the state where the court is—i. e., the forum—and it consequently could not impart power of control to its guardian.[69]

[66] Andrus v. Blazzard, 23 Utah, 233, 63 P. 888, 54 L. R. A. 354; Thacher v. Dinsmore, 5 Mass. 299, 4 Am. Dec. 61, Decennial and Other Key No. Digests, Insane Persons, ⟸68, 69.

[67] Kelsey v. Trisler, 32 Tex. Civ. App. 177, 74 S. W. 64. Decennial and Other Key No. Digests, Insane Persons, ⟸71; Montgomery v. Perryman & Co., 147 Ala. 207, 41 So. 838, 119 Am. St. Rep. 61, 32 C. J. 713 et seq.

[68] South Penn Oil Co. v. McIntire, 44 W. Va. 296, 28 S. E. 922.

[69] Kelsey v. Trisler, 32 Tex. Civ. App. 177, 74 S. W. 64; Hotchkess v. Middlekauf, 96 Va. 649, 32 S. E. 36, 43 L. R. A. 806.

§ 203. Restriction

In addition, the guardian's power of disposition over the property of his insane ward is further restricted by the fact that its exercise must be accompanied with the highest good faith on the part of the guardian, even when authorized by the court, and it has been held that failure to exercise such good faith will avoid a sale, and that it can be set aside on proper application, where from the circumstances of the sale, etc. the purchaser can in any way be charged with notice of such irregularity. For example, it has been held that, where the guardian sold the property of his insane ward and diverted the proceeds to pay his own debts due the purchaser,[70] or where he made such sale for his own benefit and for an inadequate consideration,[71] even though he afterwards accounts for the money actually received, the sale or sales will be voidable. However, in the absence of facts that will charge the purchaser with notice, or of a showing of bad faith on his part, the sale will hardly be set aside to the prejudice of a purchaser in good faith and for adequate consideration;[72] or if set aside, the purchase money will at least be refunded to him,[73] and he may even be given an equitable lien against the property for the amount so paid.[74] On the theory that his own interests should not be allowed to conflict with those of his ward, a guardian may not purchase the property of his insane ward, either directly or through another. To allow him to do so would put him in a position adverse to that of his ward, which would be inconsistent with his fiduciary relations.[75]

[70] Stone v. Cromie, 87 Ky. 173, 7 S. W. 920.
[71] Heyl v. Goelz, 97 Wis. 327, 72 N. W. 626.
[72] Smith v. Burnham, 1 Aikens (Vt.) 84.
[73] In re Valentine, 72 N. Y. 184.
[74] Reals v. Weston, 28 Misc. Rep. 67, 59 N. Y. S. 807.
[75] Boyce v. Warren, 19 N. C. 498; Taylor v. Klein, 170 N. Y. 571, 62 N. E. 1101; Goodell v. Goodell, 173 Mass. 140, 53 N. E. 275.

§ 204. Title of guardian in estate

A matter of much discussion, though somewhat academic, has been the question of just how far the guardian holds title to the property, especially the real estate, of the insane ward, or how far his control extends over the estate itself. In this connection, it seems to be fairly well established that the guardian or committee really has no interest or property right in the estate itself. This can more readily be understood by reverting to the nature and end of guardianship; that is, that the chancery or probate courts are merely the agencies of sovereignty to guard the interests of the non compos ward, and the guardian, committee, or curator is an officer of the court administering the affairs of the estate.[76] As will be recalled, under the common law the estates of idiots were granted to the king, being one of the sources of his revenue; but he was required to administer them, and to restore them to the heirs of the non compos upon the death of such insane incompetents. His holding, therefore, was merely a trusteeship.[77] Power to act to this end was later conferred on the Lord Chancellor,[78] whose powers the courts of this country vest in the guardian. Hence, Finch, J., in Pharis v. Gere,[79] in discussing the matter, says: "A survey of the earlier authorities * * * has led me to the conclusion that the committee of a lunatic has no title to or interest in the latter's real estate; that he becomes its mere custodian or bailiff, and is such solely as the agent or representative of the court, and has no independent power to dispose of the real estate in any manner whatever." To the same end it has been held that he cannot bind the ward by his own personal contracts.[80] It has been questioned

[76] Kent v. West, 33 App. Div. 116, 53 N. Y. S. 244; Pharis v. Gere, 110 N. Y. 336, 18 N. E. 135, 1 L. R. A. 270.

[77] 17 Edw. II, cc. 9, 10; Bevely's Case, 4 Coke, 127; 1 Bl. Com. c. 8, § 18.

[78] In re Brown, 1 Abb. Pr. 108, 109, 11 N. Y. Super. Ct. 613.

[79] Pharis v. Gere, 110 N. Y. 336, 18 N. E. 136, 1 L. R. A. 270.

[80] Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199.

whether the guardian or committee of a non compos may even take such property in his own name for the benefit of the non compos.[81] Inasmuch as the guardian or committee has no interest or property in the estate itself, it is apparent that he can convey nothing by his mere deed, unaided by the direction of the court of his appointment.

§ 205. Consideration of conveyance

As a general rule, where a sale is made by the guardian of the ward's property, especially his real estate, it would seem that such guardian has no authority to accept any thing except money in payment thereof. For example, it has been held that he has no right to accept an assignment of a lease in lieu of money.[82] The reason is, of course, that such a practice would lay the incompetent ward open to loss from unwise trades made by his guardian. The same rule seems to apply with equal force to leases and similar conveyances.[83] As corollary to the rule noted above, it is usually held that the guardian may, under the direction of the court of his appointment, make such elections, etc., with reference to the property of the non compos ward, as such ward could make if sane, and which would be for his best interest;[84] and this is especially true when sanctioned by statute.[85] Where the guardian refuses to so act in the matter of election, or where he has not acted for the best interests of the insane ward in the election he has made, a court of equity may interpose to make the election itself.[86]

81 People ex rel. Canady v. Williams, 90 Hun, 505, 36 N. Y. S. 65.

82 Walrath v. Abbott, 75 Hun, 452, 27 N. Y. S. 529.

83 Milliken v. Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281.

84 Young v. Boardman, 97 Mo. 181, loc. cit. 192, 10 S. W. 48, 53.

85 Kent v. Morrison, 153 Mass. 137, 26 N. E. 427, 10 L. R. A. 756, 25 Am. St. Rep. 616.

86 In re Conner's Estate, 254 Mo. 65, 162 S. W. 252, 49 L. R. A. (N. S.) 1108; Primeau v. Primeau, 317 Mo. 828, 297 S. W. 382.

§ 206. Power to incur obligations

As a general rule the guardian of an insane ward may not execute notes in his capacity as guardian, and an attempt on his part to do this will ordinarily cause him to become personally liable on the same,[87] though it would seem that in proper cases and under conditions he may look to the estate of the insane ward for reimbursement.[88] This will hold true, even where the guardianship has been closed and the guardian can no longer look to the estate for reimbursement.[89] Where the execution of the notes or other forms of commercial paper are first authorized by the probate court, it seems to be held that the guardian can regularly look to the estate of the ward for reimbursement.[90] In this connection, it would seem that the fact that notes are made by a guardian, acting as such, will not affect their negotiability, except to give notice of the character of ownership and of the existence of possible equities. Therefore such a guardian may freely transfer and sue on such notes in his own name, so long as he acts in good faith and protects the interests of the insane ward.[91]

In some of the states a different rule is recognized, usually based on the construction of local statutes. An example of this is found in Texas, where it is held under the wording of the statute that a transfer of notes by a guardian without an order of the probate court will be without effect, and that the transferee takes no title whatever.[92]

[87] Thacher v. Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; Tenney v. Evans, 14 N. H. 343, 40 Am. Dec. 194; Thompson v. Boardman, 1 Vt. 367, 18 Am. Dec. 684; Andrus v. Blazzard, 23 Utah, 233, 63 P. 888, 54 L. R. A. 354.

[88] Gibson v. Irby, 17 Tex. 173; Poole v. Wilkinson, 42 Ga. 539; Coons v. Kendall, 27 La. Ann. 443; Carter v. Wolfe, 1 Heisk. (Tenn.) 694; Forster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87.

[89] Thacher v. Dinsmore, 5 Mass. 299, 4 Am. Dec. 61.

[90] Coons v. Kendall, 27 La. Ann. 443.

[91] 1 Notes on Tex. Cas. 26; 8 C. J. 174, 175.

[92] Browne v. Fidelity & Deposit Co. of Maryland, 98 Tex. 55, 80 S. W. 93.

§ 207. By corporations

Somewhat analogous to the control of the guardian and committee over the property of the ward is the question of the right of corporations to hold property for the benefit of the non compos. The question arises frequently in connection with trusts established for the benefit of such incompetents, and the tendency has been to recognize the right of such corporations to receive and administer such trusts where they come within the purpose of their corporate existence, either as public or private institutions. For example, it has been held that a city may accept a trust fund, to be administered by it for the benefit of its insane,[93] and that the head of an incorporated state asylum may accept the administration of a trust fund for the benefit of inmates of that institution.[94]

§ 208. Control over person of ward

As one of the purposes of the guardianship of insane persons is the care and protection of such person, who is incompetent to care for himself, it is evident that a reasonable amount of control over the person of the non compos must be given to the guardian, in order for him to carry out this end and purpose of the guardianship. However, in considering the extent of such power and control of the guardian over the non compos ward, only one question should be considered, viz., the best interests of the non compos. For this end he is placed under the control of the guardian, and this should measure, as well as justify, the guardian's right of control. Therefore, when the guardian attempts to go beyond this, his right of control ceases, and his acts become unlawful.

[93] Staub's Succession, 123 La. 119, 48 So. 766, 131 Am. St. Rep. 350.

[94] Mason's Ex'rs v. Trustees of Methodist Episcopal Church, 27 N. J. Eq. 47.

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§ 209. Removal of ward's person

As a result of the foregoing general principle, it is held that the right of a guardian of an insane ward to remove such ward out of a given jurisdiction depends upon whether such removal is conducive to the ward's best interests. The question of the propriety of such removal rests within the sound discretion of the court having jurisdiction. Such court may grant leave for such removal upon such conditions as it thinks proper, as, for example, to require that the guardian shall first give bond for the return of the insane ward.[95] As stated by Collins, J., in the case of Raymond v. Lawrence:[96] "While there can be no doubt of the right of the guardian to temporarily remove his ward from one state to another, * * * the right is always subject to the power of a court of chancery to forbid and restrain an improper removal or injurious change. The welfare of the ward is the chief matter to be considered, not the wishes of the relations or the convenience of the guardian." As corollary to the above, this rule has been extended and made to apply to the removal of such incompetent by relatives and other persons standing in the relation of natural guardians.[97] In many of the states, the right of a guardian to remove his ward from the state, or to change and fix the residence of such ward, is controlled by local statutes.

[95] In re Birch, Ir. L. R. 29 Eq. 274; In re Starr, 1 Coop. t. Cott. 227; Parsee Merchant's Case, 11 Abb. Prac. (N. S.) 223; Ward v. Augevine, 46 Ind. 416; Townsend v. Kendall, 4 Minn. 412 (Gil. 315), 77 Am. Dec. 534; State ex rel. Raymond v. Lawrence, 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 931.

[96] State ex rel. Raymond v. Lawrence, 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 931.

[97] Rutter v. State, 38 Ohio St. 496; Kendall v. May, 10 Allen, 59.

§ 210. Exclusion of relations by guardian

Since the extent of a guardian's control over the person of his insane ward is limited by necessity and the welfare of such ward, a guardian has no right to unreasonably prevent access to an insane person by his relatives, and perhaps close friends, and especially where there is a suggestion that this restriction might be for an improper motive on the part of the guardian. The rule in this respect seems to be that, while the relatives and friends of such non compos have no unlimited right to see the non compos at all times, or of remaining with him, yet such relatives and friends have a right to see the non compos ward at reasonable hours and under proper circumstances, without reference to the wishes of the guardian, provided it is not shown to be detrimental to the insane person's health, or otherwise positively injurious to him.[98]

§ 211. Exterritorial control by guardian

In the absence of local statutes to the contrary, the rule of comity existing between the states authorizes the courts of one state, through their regularly appointed guardians, to exercise control over the persons of insane wards residing in another state. The same is true in a more limited sense with reference to property of such insane ward situated in another state. It would seem, however, that the state where the ward has his domicile is the proper forum for guardianship proceedings, and guardians appointed in other states will ordinarily be considered ancillary to the one appointed in the domicile of the ward.[99]

98 State ex rel. Raymond v. Lawrence, 86 Minn. 310, 90 N. W. 769, 58 L. R. A. 931.

99 Minor's Conflict of Laws, §§ 114–116.

§ 212. Collateral attack on guardianship

Where once entered, such a decree, placing an alleged insane person under guardianship and appointing a guardian or committee to take over the control of his person and property, is not open to collateral attack, except where the court making the appointment was without jurisdiction to enter the decree, as, for example, where there was lack of proper service, no original jurisdiction to entertain that form of judicial proceeding, etc.[1] In such cases, all reasonable presumption will be indulged in favor of the regularity of the order. Under the rule of comity, the decree of any other state will ordinarily be given the same force as that of a local court,[2] except where it was obtained by fraud, etc.

§ 213. Foreign guardians

The status of foreign guardians is controlled very largely by local statutes, which restrict or enlarge the ordinary rules of comity according to the local idea of the propriety of the matter. A large number of the states provide for the recognition or reappointment of such guardians, so as to bring them under the control of the local courts. As a general rule, in the absence of statute, comity will require the recognition of a duly appointed foreign guardian, especially with reference to his right of control over the person of the insane ward;[3] and, even where a local appointment is taken out, it is usually recognized as ancillary to the guardianship proceedings pending in the domicile of

[1] In re Fidelity Trust Co. of Newark, 27 Misc. Rep. 118, 57 N. Y. S. 361; In re Holcomb, 111 Iowa, 525, 82 N. W. 1000; Decennial and Other Key No. Digests, Insane Persons, ⟸36; 10 Enc. Dig. Tex. Cas. p. 66.

[2] See § 213.

[3] Minor's Conflict of Laws, §§ 114–116; 32 C. J. 793; Decennial and Other Key No. Digests, Insane Persons, ⟸43; In re Fidelity Trust Co. of Newark, 27 Misc. Rep. 118, 57 N. Y. S. 361; In re Holcomb, 111 Iowa, 252, 82 N. W. 1000.

the non compos.[4] With respect to the property of the non compos ward, situated in a state other than that where the guardianship proceedings are pending, a somewhat different rule governs. Before a guardian can deal with property of his insane ward in a jurisdiction other than that of his appointment, he must be reappointed, or recognized, under the formalities required by the courts of the situs of the property;[5] but such second appointment is ancillary to the original appointment,[6] and its legality will depend upon the validity of the first, or original, proceedings.[7] But, where the interests of local persons are involved, a different principle applies; and a state court may refuse to recognize a foreign guardian and appoint an independent resident guardian.[8]

§ 214. Appeal and review

The right to appeal from an order appointing, or refusing to appoint, a guardian, and the procedure incident thereto, is largely controlled by local statutes relating to the appointment of guardians. In the absence of a clear statutory intent to the contrary, the prevailing rule seems to be that such an order may be appealed from as in case of other final judgments.[9] In this connection, there has been some attempt to distinguish between an order appointing a guardian and an order refusing to appoint a guardian, conceding a right to appeal in the former and denying such a right in the latter case;[10] but we do not think the distinction has been generally recognized. It has been held that,

4 Minor's Conflict of Laws, § 115; 32 C. J. 793; Decennial and Other Key No. Digests, Insane Persons, ⟸43.

5 Minor's Conflict of Laws, § 116; 32 C. J. 793; Decennial and Other Key No. Digests, Insane Persons, ⟸43.

6 Com., to Use of Todd, v. Rhoads, 37 Pa. 60.

7 In re Bassett, 68 Mich. 348, 36 N. W. 97.

8 Brown v. Fox (N. J. Ch.) 51 A. 621.

9 32 C. J. 660; Decennial and Other Key No. Digests, Insane Persons, ⟸33(2). Tierney v. Tierney, 81 Neb. 193, 115 N. W. 764, 15 L. R. A. (N. S.) 436, note; In re Moss, 120 Cal. 695, 53 P. 357.

10 Nimblet v. Chaffee, 24 Vt. 628.

where an appeal has been taken to the appointment of a guardian, the powers of such guardian are not suspended during the appeal.[11] Great injury might result in such case, where the incompetent is left free, pending the appeal, to dispose of his effects as he sees fit; while, on the other hand, little injury, outside of possible inconvenience, could likely result from the retention of the guardianship pending a final adjudgment of the matter in the appellate court. This rule seems to be a logical one. In this connection, it has been held that it is not necessary that the same person representing the non compos as guardian ad litem in the lower court appear for him on application for a writ of error or on an appeal, but that such application for writ of error or appeal can be prosecuted by a different person as next friend for such non compos, the court having general oversight over the conducting of such proceedings.[12]

§ 215. Appeal and review in Texas

In Texas, under the provisions of local statutes, a review of the proceedings in the county court may be had in the district court by appeal,[13] by bill of review,[14] or by certiorari.[15] Where the matter is so removed to the district court by appeal, a trial de novo is had in that court,[16] while a bill of review is only intended to review error of law apparent upon the face of the record.[17]

[11] Harwood v. Boardman, 38 Vt. 554.

[12] Iago v. Iago, 168 Ill. 339, 48 N. E. 30, 39 L. R. A. 115, 61 Am. St. Rep. 120.

[13] Warrick v. Moore County (Tex. Civ. App.) 291 S. W. 950.

[14] Warrick v. Moore County (Tex. Civ. App.) 291 S. W. 950; Vernon's Ann. Civ. St. Tex. 1925, art. 4328.

[15] Kelsey v. Trisler, 32 Tex. Civ. App. 177, 74 S. W. 64.

[16] Vernon's Ann. Civ. St. Tex. 1925, art. 4327; Horton v. Horton (Tex. Civ. App.) 264 S. W. 293.

[17] Miller v. Miller, 21 Tex. Civ. App. 382, 53 S. W. 362.

§ 216. Termination of guardianship, generally

Guardianship over a non compos ward may be terminated in any one of three ways: (1) He may be removed by the court which appointed him, on proper cause being shown therefor; (2) the guardianship may be terminated by the death or voluntary resignation of the guardian; (3) or such guardianship may be terminated by the death of the ward or his restoration to reason.[18] We will consider each of these in turn.

§ 217. Removal by court

As the guardian is an officer of the court of his appointment, appointed for the special purpose of administering the estate of the insane ward or of looking after his welfare, he is subject to the control of such court and to removal thereby on proper cause being shown, which would make his further acting in capacity as guardian undesirable,[19] such as, for example, the improper conducting of the ward's affairs,[20] inefficiency of the guardian through intemperance, etc.,[21] the existence of conditions which make the interests of the guardian antagonistic to those of the ward,[22] the removing of the guardian out of the jurisdiction of the court,[23] and insanity of the guardian.[24] In this connection it is held that the guardian or committee must have reason-

[18] 32 C. J. 665; Decennial and Other Key No. Digests, Insane Persons, ⟸37, 38, 44; 10 Enc. Dig. Tex. Cas. p. 68.

[19] In re Osborn, 74 App. Div. 113, 77 N. Y. S. 423; 11 N. Y. Ann. Cas. 211; Miller v. Rutledge, 82 Va. 863, 1 S. E. 202; Griffin v. Collins, 122 Ga. 102, 49 S. E. 827; Morgan's Case, 3 Bland (Md.) 332; Vernon's Ann. Civ. St. Tex. 1925, arts. 4228–4238.

[20] In re Arnold, 76 App. Div. 126, 78 N. Y. 772, 12 N. Y. Ann. Cas. 168; Watt v. Allgood, 62 Miss. 38; Prince v. Ladd (Tex.) 15 S. W. 159; Cherry v. Wallis, 65 Tex. 442.

[21] Kettletas v. Gardener, 1 Paige (N. Y.) 488.

[22] Hill v. Whiteside, 237 Pa. 340, 85 A. 425.

[23] In re Lagay, 2 McGloin (La.) 185; Watt v. Allgood, 62 Miss. 38; McIlwane D. art. 2696, § 3.

[24] Damarell v. Walker, 2 Redf. Sur. (N. Y.) 198.

able notice of such contemplated removal, in order that he may have ample opportunity to appear and explain or defend his alleged incompetency.[25]

§ 218. By death or resignation of guardian

Not only may a guardianship of a non compos be ended by the court's removal of the guardian, but it may be ended by the act of the guardian himself. For example, death of the guardian may intervene to leave vacant the office,[26] and in this connection it seems to be the rule that, where there are two or more joint guardians, the death of one will operate ipso facto to terminate the guardianship.[27] Also, in a limited sense, such a guardianship may be terminated by the resignation of the guardian. It seems to be a generally accepted rule that a person who takes upon himself the duties of a guardian may not lay the same down at his own pleasure, and surrender this trust in connection therewith as a matter of right, unless authorized to do so by statute.[28] However, the court of his appointment may accept such resignation and discharge him at its discretion [29] in much the same way that it may discharge him in the first instance. It has been held that the resignation of such guardian may be accepted by the court and the guardian discharged without being given notice thereof;[30] but the better rule would seem to require that reasonable notice be given of the acceptance of the

[25] Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665; Ward v. Augevine, 46 Ind. 415.

[26] Rev. St. Tex. 1925, art. 4228; 27 Century Digest Insane Persons, § 71; 8 Enc. Dig. Tex. Cas. 912(1).

[27] Boardman's Case, 2 Bland (Md.) 89.

[28] In re Miller, 15 Abb. Prac. (N. Y.) 277; Evans v. Johnson, 39 W. Va. 299, 19 S. E. 626, 23 L. R. A. 737, 45 Am. St. Rep. 916; Marlow v. Lacy, 68 Tex. 154, 2 S. W. 52.

[29] Vernon's Ann. Civ. St. Tex. 1925, art. 4229 et seq.; In re Osborn, 74 App. Div. 113, 77 N. Y. S. 423, 11 N. Y. Ann. Cas. 211; Miller v. Rutledge, 82 Va. 863, 1 S. E. 202; Griffin v. Collins, 122 Ga. 102, 49 S. E. 827; Morgan's Case, 2 Bland (Md.) 332.

[30] Jorgenson v. Winter, 69 Wash. 573, 125 P. 957.

resignation and the contemplated discharge, in order that ample opportunity be given to object to his administration before his final discharge as guardian.[31]

§ 219. By death or recovery of ward

The guardian of a non compos ward may be discharged by reason of the death of the ward or the restoration of the ward to reason, as either of such conditions would end the necessity of the guardianship. In the former case it is terminated ipso facto, except accounting for the ward's property in his care,[32] while in the latter case it terminates upon the recovery of the ward being judicially determined.[33] In the case of the recovery of the ward, whether an order of the court will be necessary, discharging the guardian and restoring the non compos to control of his affairs, or whether such discharge and restoration is effected ipso facto by the court's finding the ward sane and fixing his status as a normal person, depends upon the local construction, and there seems to be no fixed general rule with reference thereto.[34] An example is found in the case of the Texas statutes, under the wording of which the former rule would seem to be the controlling rule. On the whole, it is likely that this will also be found to be the better of the two rules. After one has been judicially declared incapable of managing his own affairs and

[31] In re McCusker, 66 N. Y. S. 105, 32 Misc. Rep. 47; Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665; Ward v. Angevine, 46 Ind. 415; Rev. St. Tex. 1925, art. 4230.

[32] Stobert v. Smith, 184 Pa. 34, 38 A. 1019; In re Beckwith, 87 N. Y. 503; Masters v. Jones, 158 Ind. 647, 64 N. E. 213; In re Kelley's Estate, 184 Cal. 448, 194 P. 4; Decennial and Other Key No. Digests, Insane Persons, ⟸No. 44.

[33] 32 C. J. 676; Decennial and Other Key No. Digests, Insane Persons, ⟸37, 38 & 42. In re Scheuer's Estate, 31 Mont. 606, 79 P. 244; Cochran v. Amsden, 104 Ind. 282, 3 N. E. 934; Matter of Giles, 11 Paige (N. Y.) 638; Lystir's Appeal, 54 Mich. 325, 20 N. W. 83.

[34] Hovey v. Harmon, 49 Me. 269; In re Scheuer's Estate, 31 Mont. 606, 79 P. 244.

has been placed under guardianship, all the world has notice that the guardian alone can be dealt with. The non compos has become at such time a ward of the court, and can only be released therefrom by the court signifying that such wardship is no longer necessary and discharging him from its care. Hence it would seem to be the better rule for the court to take some affirmative action signifying such discharge, and not leave it to be inferred from the fact of recovered sanity.

As corollary to the rule that the death of the ward will terminate the guardianship, it would seem that the death of such ward would have the same effect upon all proceedings looking to the determination of the guardianship, as, for example, such death would abate a proceeding looking to the establishment of the ward's restoration to reason,[35] or a proceeding to question the force of the guardianship on the ground of the ward's recovery of reason prior to his death. But the death of an insane ward will not abate a suit being prosecuted by the non compos, as the cause of action survives in his personal representatives, and it may be prosecuted by them.[36]

§ 220. Proceedings incident to discharge

The procedure incident to the determination of a person's restoration to sanity, and of his consequent discharge from guardianship, is usually predicated upon local statutes. The recovery by the non compos of his sanity is usually brought to the attention of the court, either by the ward himself, by means of a petition, motion, or similar means,[37] through the agency of some third party, acting on the ward's behalf,[38] or by the guardian himself.[39] In most of the states, as in Texas, for example,[40] the

[35] In re Beckwith, 3 Hun (N. Y.) 443, 6 Thomp. & C. 13.

[36] Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070, 1 A. L. R. 1514, and note.

[37] In re Price, 8 N. J. Eq. 533; Coot v. Willet, 93 Mich. 304, 53 N. W. 395.

[38] Cochran v. Amsden, 104 Ind. 282, 3 N. E. 934.

[39] Supra, § 219.

[40] Vernon's Ann. Civ. St. Tex. 1925, art. 4282.

suggestion to the court of the ward's restoration to sanity may be made by any creditable person, upon which suggestion the court may act by directing an inquiry into the ward's sanity. In this connection, it would seem that, where the person and estate of a non compos is in the hands of separate guardians, one of such guardians may not be discharged without the other.[41]

§ 221. Costs—Taxing

The taxing of costs incurred in connection with a proceeding looking to the establishing of the fact of a ward's restoration to sanity rests very largely within the discretion of the court, where it is not controlled by statute,[42] and, even where the petition to adjudge an insane person to be restored to sanity is denied, the court costs, and reasonable attorney's fees in some cases, may be allowed out of the estate of the non compos.[43] The determining feature in such case seems to be the good faith of the person instituting the proceedings. Where it appears that the proceeding was commenced in good faith and on apparently reasonable grounds, the costs may be so allowed,[44] on the theory that such proceedings were in good faith, intended for the best interests of the insane ward; but such costs may not be allowed where such reasonable grounds or good faith is wanting.[45] A harsh or arbitrary ruling in this connection might work to the decided prejudice of the ward, as third parties would hesitate to interfere in his behalf, if there was an apprehension that they would be charged with all costs of the proceeding in case

[41] In re Burr, 17 Barb. (N. Y.) 9.

[42] Carter v. Beckwith, 128 N. Y. 312, 28 N. E. 582; Cochran v. Amsden, 104 Ind. 283, 3 N. E. 934; Kelly v. Kelly, 72 Minn. 19, 74 N. W. 899.

[43] Kelly v. Kelly, 72 Minn. 19, 74 N. W. 899.

[44] Carter v. Beckwith, 128 N. Y. 312, 28 N. E. 582; Palmer v. Palmer, 38 N. H. 418; Kelly v. Kelly, 72 Minn. 19, 74 N. W. 899.

[45] Cochran v. Amsden, 104 Ind. 282, 3 N. E. 934; In re Beckwith, 3 Hun (N. Y.) 443, 6 Thomp. & C. 13.

the guardianship was continued; and for this reason the matter is placed within the sound discretion of the court who may act in the light of all the circumstances of the case before it.

§ 222. Accounting by guardian, generally

As an officer of the court, it is the duty of the guardian of a non compos ward to make proper reports to the court of his appointment. He must also make a proper accounting of his stewardship to such court before he is released from his duties as guardian; and he should make such reports at proper intervals during the term of his office, where he is required so to do by statute, by the terms of his appointment, or by the orders of such court. The time and manner of making such reports are usually regulated by the statutes and Codes of the respective states. These are far too extended to consider in a work of this scope, and the practitioner is referred to such as may be in force in his state. However, a few general principles, common to almost all of the statutes, and generally followed where no local statutes appertain, will be noticed. It might be added that, as a general rule, statutory rules governing the relation of guardian of minors will be followed with reference to the relation of guardians of insane wards, and in the absence of statutes specifically relating to the guardianship of insane persons, inasmuch as the relations are largely analogous.[46]

§ 223. Principles governing accounting

In respect to the reports to be made by him, a guardian occupies much the same position as that of a trustee in a court of equity;[47] and, being an officer of the court of his appointment, he cannot, as a general rule, be called on to make an accounting of his guardianship in another court,[48] except where his report, duly made to the court of his appointment, is under review in a

[46] Spack v. Long, 36 N. C. 426.
[47] Story, Eq. Jur. §§ 465, 512
[48] In re Butler (Hall. In re) 8 N. Y. Civ. Proc. R. 56.

court of appellate jurisdiction. It is generally conceded that such an account of a guardian should be governed by equitable principles generally, and the best interests of the non compos ward should be aimed at, consistent with fair treatment of the guardian. To this end the guardian will be allowed his proper disbursements, made in the course of his guardianship,[49] will be allowed a fair compensation for his efforts in the conduct of the affairs of his non compos ward, and may collect debts justly due him by the ward,[50] though he cannot retain funds in his hands belonging to the non compos ward, in satisfaction of such debt. In order to preclude any chance for imposition, all such funds should be paid into court, together with the other funds belonging to the estate; and the claim of the guardian should be filed, allowed, and paid under the direction of the court and in the case of the other claims due by the estate.[51]

§ 224. Accountability for losses

Under the equitable rules of trusteeship, it is incumbent upon a guardian of an insane person to use reasonable efforts and care in the administration of his ward's estate. It is not only incumbent upon him to preserve it intact, as far as he is reasonably able to do so, but the guardian may not use the estate for his own benefit, or allow it to remain unproductive, where by reasonable effort he can make it produce an income. Hence the rule is generally recognized that a guardian must reimburse the estate for all losses occasioned by his bad faith, negligence, or incompetence.[52]

[49] Harwood v. Boardman, 38 Vt. 554; Decennial and Other Key. No. Digests, Insane Persons, ⊂⊃42(1).

[50] Carter v. Edmonds, 80 Va. 58.

[51] Neill v. Neill, 31 Miss. 36; McKenzie v. Bacon, 40 La. Ann. 157, 40 So. 65; In re Killick, 54 Hun, 634, 7 N. Y. S. 360.

[52] Straight v. Ice, 56 W. Va. 60, 48 S. E. 837; In re Gallagher, 63 Hun, 624, 17 N. Y. S. 440; In re Averill's Estate, 133 Cal. 19, 66 P. 14.

But at the same time the best authorities seem to agree that such a guardian is not accountable for losses occurring to the estate which are not chargeable to the guardian's want of care or actual wrong.[53] In the exercise of reasonable care for the ward's interests, the guardian may not allow funds belonging to the estate to lie idle, where, by the exercise of reasonable effort, they could be made to earn interest; and where he does permit this, he will usually be charged with such interest.[54] Simple interest only is charged against him,[55] unless the neglect was willful.[56] But as the rule is only intended to guard against neglect on the part of the guardian, interest will not be charged against a guardian who has an adequate reason for retaining the funds in his hands in place of putting them out at interest. For example, it is held that such interest should not be charged against a guardian, where he has merely retained the funds in his hands pending the settlement of conflicting claims.[57] Where the action of a guardian in retaining funds of his insane ward amount to more than mere neglect of duty, and become an actual breach of trust, he will usually be chargeable with more than simple interest; some courts charging him with compound interest.[58]

[53] Story, Eq. Jur. § 465; De Treville v. Ellis, Bailey, Eq. (S. C.) 35, 21 Am. Dec. 518; Indiana Trust Co. v. Griffith, 176 Ind. 643, 95 N. E. 573, 44 L. R. A. (N. S.) 896, Ann. Cas. 1914A, 1023; Gregory v. Parker, 87 Va. 457, 12 S. E. 801; Matter of Hathoway, 80 Hun, 186, 30 N. Y. S. 171.

[54] In re Thomas' Estate, 26 Colo. 110, 56 P. 907; Stumph v. Guardianship of Pfeiffer, 58 Ind. 472; Crigler's Committee v. Alexander, 33 Grat. (Va.) 674; 32 C. J. 700; Decennial and Other Key No. Digests, Insane Persons, ⟸60.

[55] Authorities cited under § 224, note 54.

[56] Butler v. Jarvis, 51 Hun, 248, 4 N. Y. S. 137.

[57] Bulows v. O'Neal, 4 Desaus (S. C.) 394.

[58] Knight v. Watts, 26 W. Va. 175.

§ 225. Good faith required

In view of the confidential relations existing between the guardian and his insane ward, and the fact that the peculiar helpless condition of the ward calls for the exercise of the highest good faith on the part of the guardian, the courts will not tolerate the guardian using his position as such for his own profit and to the detriment of the non compos ward.[59] A guardian of an insane ward must as a matter of right refund to such ward all amounts due him by the guardian.[60] Where the guardian allows money belonging to the estate of the non compos ward to become mingled with his own, or otherwise appropriates it to his own use, he will be chargeable with interest thereon in the same manner as in the case of a guardian of a minor ward;[61] and, where the circumstances under which it occurs make the conduct of the guardian especially reprehensible, he may be charged with compound interest or other penalties.[62] He must account to the estate for all profits accruing to him from the labors of the insane ward,[63] since he will not be allowed to use the labors of the insane ward to his own advantage. Where the guardian has sold the lands of his insane ward for his (the guardian's) own benefit and for an inadequate consideration, the courts will not recognize the force of the sale, and it has been held that such a sale may be repudiated, not only by the non compos ward, but by his heirs after his death.[64]

[59] Decennial and Other Key No. Digests, Insane Persons, ⟸ 42(2).

[60] Neill v. Neill, 31 Miss. 36.

[61] Spack v. Long, 36 N. C. 426; In re Thomas' Estate, 26 Colo. 110, 56 P. 907; 32 C. J. 700; Decennial and Other Key No. Digests, Insane Persons, ⟸60.

[62] Knight v. Watts, 26 W. Va. 175.

[63] Ashley v. Holman, 15 S. C. 97.

[64] Heyl v. Goelz, 97 Wis. 327, 72 N. W. 626.

§ 226. Accountability for ward's debts

Ordinarily the guardian of an insane person is not personally responsible for debts contracted by him for the benefit of such ward, inasmuch as in contracting such debts he is not himself liable for the ward's support.[65] But this does not prevent the guardian from making himself liable for such debts by express contract,[66] by misrepresentations such as would mislead the other party to his prejudice, as by leading the creditor to believe that he is pledging his own credit, or by contracts clearly out of the range of his authority as guardian.[67]

§ 227. Suits between guardian and ward

As the result of the relations existing between him and his insane ward, the guardian or committee cannot sue his ward,[68] though the ward may sue the guardian at pleasure, through a next friend or through a guardian especially appointed by the court.[69] The reason for the rule is obvious, when the relations of the parties are taken into account. Since the interest of the non compos ward has been especially intrusted to the guardian, he may not be allowed to assume an adverse position, where it would be impracticable for him to continue to discharge his trust.

§ 228. Finality of guardian's account

As a general rule, a properly entered decree of a court of competent jurisdiction, approving the final account of a guardian, committee, curator, etc., is conclusive so far as it relates to the

[65] Merrimack County v. Kimball, 62 N. H. 67; Western Cement Co. v. Jones, 8 Mo. App. 373.

[66] Isaacs v. Chinery, 74 Law T. (N. S.) 320; Massachusetts General Hospital v. Fairbanks, 132 Mass. 414; Hutchinson v. Hutchinson, 19 Vt. 437.

[67] Person v. Merrick, 5 Wis. 231; In re Kimble, 127 Iowa, 665, 103 N. W. 1009.

[68] Tally v. Tally, 22 N. C. 385, 34 Am. Dec. 407.

[69] See ante, § 310.

amount shown to be in hand at the time the decree is entered, and of the matters connected with such adjudication, and such decree will bind and protect both the guardian and the sureties on his bond as to such matters, and carry with it the presumptions usually indulged in favor of judgment regular on their face.[70] But this only applies to matters that could reasonably have been expected to be within the purview of the court at the time it entered the decree,[71] and it may be attacked by direct action with reference to matters not coming within the action of the court at the time of its passing upon the final account, and for fraud and similar irregularities in the entering of such decree.[72]

§ 229. Rule in Texas

The general rule, recognizing as final the decree entered on the final account of a guardian, relating to matters adjudicated therein, seems to apply in the Texas courts; but its effect is somewhat limited by statute. Under the state Constitution, and statutes based thereon, it is held that such a decree may be inquired into by an action in the district court, brought within the statutory period, and that the correctness of such an account of the guardian may be questioned by the defendant in any action brought in such court to collect an amount due thereunder.[73] This rule seems to be peculiar to that state.

[70] Shepherd v. Newkirk, 21 N. J. Law, 302; McWilliams v. Kalbach, 55 Iowa, 110, 7 N. W. 463; Com., to Use of Todd, v. Rhoads, 37 Pa. 60; Decennial and Other Key No. Digests, Insane Persons, ⟸42(3).

[71] Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440 15 Am. St. Rep. 112.

[72] Warfield v. Warfield, 74 Iowa, 184, 37 N. W. 144; Butler v. Jarvis, 51 Hun, 248, 4 N. Y. S. 137; Carter v. Edmonds, 80 Va. 58; Bonner v. Evans, 89 Ga. 656, 15 S. E. 906; Decennial and Other Key No. Digests, Insane Persons, ⟸43(3).

[73] Vernon's Ann. Civ. St. Tex. 1925, arts. 1907–1909, 4318 et seq.; Blair et al. v. Gay, 33 Tex. 157; see also United States Fidelity & Guaranty Co. v. Buhrer, 103 Tex. 557, 131 S. W. 808.

§ 230. Settlement out of court

Where the ward has recovered his reason, settlement may be made between the guardian and ward outside of the court appointing such guardian, in the absence of statutory restriction; but the courts regard settlements so made with suspicion, on account of the great opportunity for imposition on the part of the guardian, and, in order for such a settlement to be allowed to stand, it must clearly appear that the ward was fully recovered at the time it was made, and that the accounting and adjustment between the said parties was equitable and fair to the ward. The rule as we have here stated it is denied by some courts, who seem to hold that such a settlement cannot be made out of court while a guardianship is pending, inasmuch as the ward's power of independent action has been taken away by the guardianship.[74] We think, however, that the general rule is as we have stated it above.[75]

§ 231. Compensation of guardian

While compensation was not ordinarily allowed guardians under the practice of the Chancery Courts of England,[76] it has always been the policy of the courts of this country to allow the guardian of an insane ward a fair return for the time and effort he has expended in behalf of the non compos ward. Where it is not fixed by statute, the amount to be allowed rests within the sound discretion of the court appointing the guardian.[77] This being true, the court may, and usually does, allow additional

[74] Griffin v. Collins, 122 Ga. 102, 49 S. E. 827.

[75] Decennial and Other Key No. Digests, Insane Persons, ⇐ 42. Hooper v. Hooper, 26 Mich. 435; Ex parte Bumpton, Mos. 28, 25 Reprint, 281.

[76] In re Westbrook, 2 Phil. 631, 22 Eng. Ch. 631, 41 Eng. Reprint, 1087; In re Walker, 2 Phil. 631, 22 Eng. Ch. 630, 42 Eng. Reprint, 1087.

[77] Drinker's Estate, 3 Pa. Co. Ct. R. 489; State v. Jones, 89 Mo. 470, 1 S. W. 355; Jessup v. Jessup, 17 Ind. App. 177, 46 N. E. 550.

fees for special or professional services performed by the guardian out of line of his regular duties as guardian,[78] or it may withhold all compensation, where the conduct of the guardian with reference to the administration has been such as to justify such action on the part of the court, as, for example, where the guardian has acted in bad faith, has been neglectful of his duties, etc.[79] The compensation allowed guardians of insane wards, as in the case of guardians of minor wards, is usually measured on the basis of a percentage of the receipts and disbursements made by such guardian in the course of the administration of the estate,[80] and where there is special or professional service rendered, the usual and customary amount charged for such service is taken as the measure.[81]

§ 232. Compensation of natural guardians

A somewhat different rule is applied in the case of natural guardians. In the case of guardians of this class, the courts are not inclined to allow fees for ordinary services rendered in the care of the ward. For example, it has been held in this connection that a wife is not entitled to compensation for services rendered as guardian of an insane husband,[82] and the same would in all probability be held where the husband was acting as guardian for an insane wife. The reason for the rule in such cases would seem to be that guardians of this character—i. e., natural guardians—may not tax the unfortunate ward with charges for

[78] May v. May, 109 Mass. 252; Drinker's Estate, 3 Pa. Co. Ct. R. 489.

[79] Polis v. Tice, 28 N. J. Eq. 432; In re Gallagher, 63 Hun, 624, 17 N. Y. S. 440; In re Hall, 19 Ill. App. 295.

[80] Drinker's Estate, 3 Pa. Co. Ct. R. 489; Gregory v. Parker, 87 Va. 451, 12 S. E. 801; May v. May, 109 Mass. 252; Matter of Killick, 54 Hun, 634, 7 N. Y. S. 360, 4 Silv. 89. Decennial and Other Key No. Digests, Insane Persons, ⟸41.

[81] Decennial and Other Key No. Digests, Insane Persons ⟸41; Drinker's Estate, 3 Pa. Co. Ct. R. 489.

[82] Grant v. Green, 41 Iowa, 88.

services they are under moral obligation, and in some cases are under legal obligation as well, to render.

§ 233. Volunteer guardians

The rules governing the conduct of guardians of insane persons apply, not only to guardians regularly appointed by the courts, but are often made to apply, as well, to those who assume to act as such. This would seem to be especially true as to an accounting by such person, and an accounting can usually be compelled by the court in which the jurisdiction over insane persons is vested in the state in question.[83] Where a person voluntarily takes upon himself duties of this nature, he will be conclusively presumed to act, or intend to act, in accordance with rules of equity and good conscience; and the rules of trusteeship will be applied to him as in case of resulting trusts.

§ 234. Care by third parties

Under the general head of care of the insane by third persons, we will refer to those instances where the care of insane persons temporarily devolves upon persons other than those ordinarily charged with their care, as, for instance, where non compos persons are intrusted to the care of innkeepers for temporary lodging, to common carriers for transportation, etc. The cases under this head are not numerous; but a number of fairly well defined rules have been evolved governing the relation and liability of the parties in question.

§ 235. Common carriers

One of the instances where these rules are most frequently called into application is in the case of common carriers. Modern conditions make the transportation of these unfortunate persons through the agency of common carriers more and more necessary, and add importance to the rules of law governing the

[83] Bailey v. Bailey, 67 Vt. 494, 32 A. 470, 48 Am. St. Rep. 826; Robinson v. Burritt, 66 Miss. 356, 6 So. 206.

relative rights of the parties in connection therewith. On one hand is the urgent necessity of commanding the services of the common carrier to transport the insane person to his destination, distant asylums and hospitals; while on the other hand is the added burden placed upon the carrier by forcing it to receive and care for persons requiring special care and attention, and the fact that receiving such insane persons is likely to bring it into conflict with its other passengers, by contributing to their discomfort and the hazard of their travel, thereby calling into question the reasonableness of forcing passengers of so undesirable a class upon the common carrier. The rule evolved by the courts from these conditions is the result of an effort to reconcile these conflicting rights as far as possible. In a limited sense, a common carrier is charged with the duty of receiving and transporting insane passengers, and those affected with idiocy or otherwise mentally defective, when they tender the proper fare. But the carrier will be allowed to make reasonable rules for the regulation of the transportation of such passengers, and they can only be required to receive and transport non compos persons applying for passage, when such persons apply properly attended and guarded by competent persons and have proper restraint put upon them by such attendants.[84] When such non compos persons are so violent or frenzied in their conduct, or so profane, obscene, or boisterous in their language, as to frighten or cause a great or unreasonable discomfort to the other passengers, they may be refused passage by the carrier, unless sufficient previous notice is given to provide special accommodations.[85] And we would suggest that in such case the carrier would have the right to make a reasonable additional charge for such special accommodations, depending upon the requirements of each case. While the common carrier is not bound to receive the non com-

[84] Owens v. Macon & B. R. Co., 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946; Hines, Director General, v. Miniard, 204 Ala. 514, 86 So. 23, 1 A. L. R. 238.

[85] Owens v. Macon & B. R. Co., 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946; Decennial and Other Key No. Digests, Carriers ⟸236.

pos passenger, except under the conditions above noted, after having once received him for passage, it is bound to carry out the contract for transporting him, unless it was without notice of his mental condition at the time it received him for transportation, and it must use all reasonable care to guard him and provide for his safety during the time he is in charge of such carrier during the course of such transportation.[86] But it would seem that the carrier, in order to be so charged, must have actual notice of such mental condition, or from the facts of the case must necessarily be charged with such notice; and the mere selling of a ticket for the transportation, without actual notice of the violent state of the non compos, will not in itself be sufficient to charge the carrier with the acceptance of such a passenger.[87]

Concurrent with the duty of receiving and transporting non compos passengers under proper regulations is the duty of protecting the other passengers from injury, fright, or unreasonable discomfort arising from the presence of the non compos,[88] and it may even become the duty of the carrier to remove such non compos until such time as his journey can be resumed with proper safeguards for his protection and the protection and comfort of the other passengers.[89]

[86] Owens v. Macon & B. R. Co., 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946; Decennial and Other Key No. Digests, Carriers ⟸36, 4 R. C. L. 1063, 106.

[87] Owens v. Macon & B. R. Co., 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946.

[88] Hines, Director General, v. Miniard, 204 Ala. 514, 86 So. 23, 12 A. L. R. 238; Meyer v. St. Louis, I. M. & S. R. Co., 4 C. C. A. 221, 10 U. S. App. 677, 54 F. 116.

[89] Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 P. 877, 52 Am. Rep. 543.

§ 236. Rule applied to intoxicated persons

The rules governing the duty of the common carrier as to intoxicated passengers differ from those applying to non compos passengers in this: That in the former case there is no duty resting upon the carrier to receive for transportation an intoxicated person, where he is likely to become an added burden to the carrier, or render himself unsafe or greatly obnoxious to the other passengers.[90] Intoxication is usually but temporary, and the person affected may wait until he has become sober to continue his journey. Any inconvenience or damage occasioned him by the delay may be said to be chargeable to his own act of becoming intoxicated and should have been foreseen by him. Where the passenger is but slightly intoxicated, and able to take care of himself and conduct himself in a proper and orderly manner, it has been held that he should not be denied passage;[91] but the application of such a rule is not clear, since it puts upon the carrier the onus of deciding, at the time the person offers himself, the question of the extent of his intoxication and its probable effect, and whether the effect of the intoxication will increase after the passage has begun. But, having once received the passenger in a state of intoxication, the carrier is charged with the duty of safely transporting him; and, where the intoxication is of a degree that will render him unable to care for his own safety, the carrier is charged with an added degree of

[90] Bogard v. Illinois Cent. R. Co., 144 Ky. 649, 139 S. W. 855, 36 L. R. A. (N. S.) 337; Brown v. Memphis & C. R. Co., 7 F. 51; Pittsburgh, C. & St. L. R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68; Beeson v. Chicago, R. I. & P. R. Co., 62 Iowa, 173, 17 N. W. 448; Thayer v. Old Colony St. R. Co., 214 Mass. 234, 101 N. E. 368, 44 L. R. A. (N. S.) 1125, Ann. Cas. 1914B, 865; Decennial and Other Key No. Digests, Carriers ⟸236; 4 R. C. L. 1162, 1163.

[91] Milliman v. New York Cent. & H. R. Co., 66 N. Y. 642; Paris & G. N. R. Co. v. Robinson, 53 Tex. Civ. App. 12, 114 S. W. 658; Parks v. Delaware, L. & W. R. Co., 85 N. J. Law, 577, 89 A. 983; Pittsburgh, C. & St. L. R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68.

care in guarding him from dangers incident to his surroundings and mode of travel, and in furnishing him with care and attention such as reasonable prudence and foresight might demand.[92] It would seem that this duty does not entirely cease when the intoxicated passenger reaches his destination, but due care should be used to see that he reaches a place of comparative safety, or at least that he reach the station for which he took passage.[93] This rule has been held to apply to street cars.[94]

§ 237. Rule applied to Pullman cars

The rules governing the duties of common carriers with reference to the acceptance of insane persons as passengers do not seem to apply to companies operating Pullman cars, except in a very limited sense. It is held that Pullman companies have a right to make reasonable rules looking to the safety and comfort of their passengers, and that a rule made by such company, excluding from its sleeping cars and palace cars persons of unsound mind, is a reasonable rule, which the courts will recognize. In other words, there seems to be no rule of law which will force such companies to accept and provide accommodations for insane persons applying for passage in their cars.[95] A fortiori, this will apply to intoxicated persons offering them-

[92] Price v. St. Louis, I. M. & S. R. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79; Benson v. Tacoma Ry. & Power Co., 51 Wash. 216, 98 P. 605, 130 Am. St. Rep. 1096; Fox v. Michigan Cent. R. Co., 138 Mich. 433, 110 N. W. 624, 68 L. R. A. 336, 5 Ann. Cas. 68; Fisher v. West Virginia & P. R. Co., 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758; Paris & G. N. R. Co. v. Robinson, 104 Tex. 482, 140 S. W. 434; Decennial and Other Key No. Digests, Carriers ⟸236, 281.

[93] Haug v. Great Northern R. Co., 8 N. D. 23, 77 N. W. 97, 42 L. R. A. 664, 73 Am. St. Rep. 727.

[94] Vinton v. Middlesex R. Co., 11 Allen (Mass.) 304, 87 Am. Dec. 714.

[95] Pullman Car Co. v. Krauss, 145 Ala. 395, 40 So. 398, 8 Ann. Cas. 218, 4 L. R. A. (N. S.) 103, and note; Decennial and Other Key No. Digests, Carriers ⟸410.

selves for passage.[96] The probable reason for the rule is that such cars are matters of luxury and special accommodation, not a necessity in the transportation of persons, and the question of the obligation of the carrier to persons contracting for such additional convenience and comfort will outweigh the inconvenience of the non compos and intoxicated person by being denied that right.

§ 238. Rule applied to innkeepers

There are practically no decisions directly on the relative rights of innkeepers and insane guests, and the rules of law with reference to the same are based on analogy. It has been held that the rules of law governing the relation of innkeeper and guest are similar to those governing common carrier and passenger,[97] and we suggest that the rules of law governing the latter will apply in a large measure to the former, where the guest is insane.

Inasmuch as shelter and care are necessaries, and a person under legal disabilities may nevertheless bind himself therefor, the fact that a person is incompetent or under legal disabilities will not of itself justify his exclusion as a guest.[98] As the innkeeper is ordinarily required to receive any guest who is able to pay for entertainment, provided he is not objectionable to the innkeeper or the other guests,[99] we think that the fact that a guest is insane will not justify his exclusion, if he has mind enough to care for himself or is attended by a competent attendant, who is able

96 Pullman Car Co. v. Krauss, 145 Ala. 395, 40 So. 398, 8 Ann. Cas. 218, 4 L. R. A. (N. S.) 103; Decennial and Other Key No. Digests, Carriers ⊂⊃410.

97 Beale v. Posey, 72 Ala. 323, 330.

98 Watson v. Cross, 2 Duv. (Ky.) 147.

99 Roberts v. Case Hotel Co., 106 Misc. 481, 175 N. Y. S. 123; Russell v. Fagan, 7 Houst. (12 Del.) 389, 8 A. 258; Jackson v. Virginia Hot Springs Co., 209 F. 979; Willis v. McMahon, 89 Cal. 156, 26 P. 649; Bowlin v. Lyon, 67 Iowa, 536, 25 N. W. 766, 56 Am. Rep. 355.

to care for him.[1] But where the insane guest is not able to take care of himself, and is not so properly attended, or where he is so boisterous, profane, or violent that he will likely be very objectionable to the other guests, or will likely be an unreasonable burden upon the innkeeper, he may be excluded.[2] But where the innkeeper has once received him. with knowledge of his condition, he is bound to use reasonable effort to care for him. Where he has once received him, and, because of his violent condition, it becomes necessary to exclude him, the innkeeper must see that he reaches a place of comparative safety considering his helpless condition, and will not be justified in turning him out on the street, or in inclement weather.[3] It has been held that an innkeeper is under no obligation to receive one who is drunk, especially where he is so intoxicated as to be disorderly or obnoxious to the other guests,[4] and he may expel from his inn a guest who subsequently becomes intoxicated.[5]

§ 239. Mistreatment—Statutes against

By reason of their helpless and dependent condition, insane persons are largely subject to the will of those in whose charge they happen to be, and for this very reason the persons having charge of incompetent persons occupy positions that are susceptible of great abuse. As a consequence, the law scrutinizes their conduct very closely, and the courts have always been prompt to punish any abuse of such power on the part of such custodians. Indeed, in a number of states, statutes have been passed, prescribing punishment for persons guilty of harsh or

[1] See supra, § 235.

[2] Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209; In re Russ' Application, 20 Pa. Co. Ct. R. 510; Hutchins v. Durham, 118 N. C. 457, 24 S. E. 723, 32 L. R. A. 706.

[3] See supra, §§ 235, 236.

[4] Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209, 210.

[5] Holden v. Carraher, 195 Mass. 392, 81 N. E. 261, 11 Ann. Cas. 724; McHugh v. Schlosser, 159 Pa. 480, 28 A. 291, 39 Am. St. Rep. 699, 23 L. R. A. 574.

cruel treatment towards insane persons placed in their care.[6] It is also because of this helpless condition that non compos persons are placed in the same class as minor children and decrepit persons, so that an assault made upon them is raised to the grade of aggravated assault.[7]

[6] 22 Cyc. 1160, note 10; 22 Cyc. 1169, note 56.
[7] 3 Cyc. 1027.

PART 2

STATUS OF NON COMPOS AS A MEMBER OF SOCIETY

CHAPTER 8

STATUS OF NON COMPOS IN SOCIETY

Sec.
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§ 240. Status in society in general

From a legal standpoint, one of the most far-reaching effects of insanity is its influence upon the legal status of the individual stricken by it. In some respects, it is almost equivalent to a civil death. As the will and judgment are assumed to have passed away with the coming of madness, the power to act, in instances where the will and judgment are necessary agents of such action, most obviously passes with them, and the actions of the individual so affected are restricted to those classes of action where

the will and judgment are not necessary factors. Such a person is still a member of society, in the sense of existing in its midst and being entitled to its protection; but he has ceased to be a member in respect to the exercise of most of the active functions of citizenship. This change of state, or status, is automatic in its action, and depends upon no act of either the individual affected or of any other; but its full effect does not usually manifest itself until the change has been recognized and declared by the proper representatives of society. It is our purpose, therefore, to consider the range of the non compos' powers and responsibilities within the sphere of this new status, as the same apply to particular acts and conditions within the ordinary experience of organized society.

§ 241. As an individual being

As an individual member of society, the claim of the non compos is not lost sight of by reason of his helpless condition, but is rather given additional recognition. His identity as a human being is as fully recognized as before his affliction, and out of this has grown two important rules, far-reaching in their effect. The first of these is found in the rule which refuses to recognize the non compos as becoming a nonentity, so far as to allow his property to pass to his heirs as if he were physically dead, but allows the property to pass into the hands of a guardian or committee, to be administered for the benefit of such insane person.[1] The other is found in the rule which recognizes that the non compos is a subject of homicide. It was at one time contended by the earlier authorities that a person without reason could not be the subject of homicide, inasmuch as homicide is defined to be the slaying of a "reasonable creature in being," and a non compos was not a *reasonable* creature. This was later answered with the argument that this term was merely intended to designate a creature ordinarily endowed with reason, as distinguished from a beast, and was in fact but a synonym

[1] Holland v. Riggs, 53 Tex. Civ. App. 357, 116 S. W. 167.

for *human being*. Therefore a non compos was still a "reasonable creature," within the meaning of the term as here used, and the killing would subject the slayer to the penalties of the law relating to homicide.[2]

§ 242. As to domestic relations

The status of the non compos, with respect to such other persons as he is bound to by domestic relations, remains as it existed at the time madness fell upon him. Such relations as he has assumed up to that time remain as before, but he cannot assume new relations of this character. This rule is dictated by public policy. While it is important that such misfortune should not operate to dissolve the domestic relations already existing, since it would tend to disrupt families and deprive dependent ones of needed support, without serving any good purpose, yet such non compos person is no longer capable of discharging the obligations incident to, or of recognizing the nature of, such relations, and their whole purpose would be defeated if the non compos was allowed to assume them. With this in view, it is held that marriage relations already assumed are not ordinarily affected by the insanity of one of the spouses, but that such an insane person cannot legally assume that relation, as will be shown more fully under another head.[3] After much the same manner, parenthood, already assumed, is in no way affected by the insanity of either the parent or the child; but the further assumption of parenthood by an insane person is discouraged, because of his obvious unfitness for the duties incident thereto, and because proper members of society are not likely to be procreated by such mental defectives, under the rule of like begetting like. Sexual intercourse out of wedlock is made a crime for the added reason that insane participants are incapable of consenting to the act that is likely to stain them with infamy.[4] As corollary to the rule

[2] Perryman v. State, 36 Tex. 321; State v. Jones, Walk. (Miss.) 83.

[3] See ante, § 406 et seq.

[4] Com. v. Burke, 105 Mass. 376, 7 Am. Rep. 531; McQuirk v. State, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381; People v. Griffin, 117 Cal.

against the assumption of parenthood by the non compos, it is held that an insane person cannot adopt a child.[5] This is for the double reason that such a non compos person is, in the light of public policy, unfit to assume the relation, and, being without discretion, it would be a dangerous rule to allow such an incompetent to confer succession to the whole or a part of his property upon a stranger, to the exclusion of his natural heirs. It is contended with much force that the same rule will bind the spouse of a non compos, where the statute authorizing adoption provides for the participation of both spouses in the act of adopting a child. The idea seems to be the same as stated supra; i. e., if such an act was allowed on the part of the sane spouse, the insane spouse, without his consent, which he is incapable of giving, would have the succession of his property changed by another.[6] This rule would seem to be in accord with good reasoning, inasmuch as the contrary rule would allow the non compos to do through another what he could not do himself, viz., devise his property away from his natural heirs.

§ 243. As to citizenship

The position of the non compos with reference to his place in organized society is determined very largely by public policy, keeping in view the welfare of the community at large and the best interests of the non compos himself. The end in view is to restrict the non compos in these relations only where the consideration of public policy requires it.

§ 244. Domicile—Right to change

This rule is applied to the right of the non compos to control over his movements in establishing and maintaining his place of residence. While, strictly speaking, perhaps, an insane person

583, 49 P. 711, 59 Am. St. Rep. 216; Caruth v. State (Tex. Cr. App.) 25 S. W. 778.

[5] Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141.

[6] Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141.

wholly without reason may not change his domicile, inasmuch as such act presupposes the power of intelligent choice, yet it is held that a very small degree of intelligence will enable one to make such a choice. Therefore a mere showing of insanity will not of itself be sufficient to preclude the non compos from making a choice of a domicile.[7] At the same time, it has been held that a showing of complete madness is not necessary in order to deprive one of his right of choice in this connection; but it will require merely such a degree of mental incompetency as will deprive such a person of freedom of will and power of choice in the matter of the place of his residence.[8] The reason for this rule, above discussed, seems to be found in the fact that the right of choice of one's own abiding place is a right that lies so close to the human right of choice of action, seldom, if ever, working a detriment to the rights of the non compos, that the common law, whose spirit is to restrict the freedom of the individual only when his own or the public good demands it, sees no practical reason for refusing to such person the right to live where his comfort dictates.[9] What we have said applies, of course, only where such changes are not shown to be to the detriment of the non compos or to be in violation of the rights of the public. For example, in connection with the support of insane persons, where such persons have attempted to move from one jurisdiction to another, so as to raise the issue as to which jurisdiction is chargeable with their support, a much stricter rule is invoked; and an insane person will not be considered as having changed his residence by such voluntary act.[10] For much the same reason, the

[7] Talbot v. Chamberlain, 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254; Whiteford v. Kinzel, 90 Neb. 573, 133 N. W. 1124; Cadwalader v. Pyle, 95 Kan. 337, 148 P. 655; Matter of Horton's Will, 175 App. Div. 447, 161 N. Y. S. 1071; Mowry v. Latham, 17 R. I. 480, 23 A. 13.

[8] Inhabitants of Townsend v. Inhabitants of Pepperell, 99 Mass. 40; Sumrall's Committee v. Com., 162 Ky. 658, 172 S. W. 1057.

[9] Concord v. Rumney, 45 N. H. 423.

[10] Phillips v. Boston, 183 Mass. 314, 67 N. E. 250; Washington County v. Mahaska County, 47 Iowa, 57; Town of Topsham v. Williamstown, 60 Vt. 467, 12 A. 112.

statutory laws of the nation exclude the entry of aliens who are mentally incompetent, for the obvious reason that such persons are not likely to become desirable citizens.[11] But incompetent alien women, who have become citizens by reason of their marriage to citizens, do not come under the operations of the statute, in the absence of a showing that the marriage was in fraud of the alien exclusion act.[12]

Where the non compos is under guardianship, he may change his domicile with the assent of the guardian, and such assent may be inferred from acts of the guardian tending to show his acquiescence.[13] In this connection, it has been held that, even where an incompetent husband has been placed in an asylum, it will not enable the wife, whose domicile is fixed by that of the husband, to acquire a new domicile.[14]

§ 245. Right of suffrage

The effect of mental capacity on the right of suffrage does not seem to have been before the courts very often, and the number of authorities on the subject are limited. But such decisions as we have are uniform in holding that this right, as in the case of the right to hold office, should not be exercised by a person who is non compos.[15] The matter is usually regulated by specific provisions in the Constitutions of the several states, in the suffrage clause thereof, and an example of which is found in the Con-

[11] 39 Stat. 874, § 3 (8 USCA § 136).

[12] U. S. v. Tod, 285 F. 523, 26 A. L. R. 1316.

[13] Talbot v. Chamberlain, 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254; Appeal of Culvert, 48 Conn. 165; Inhabitants of Pittsfield v. Inhabitants of Detroit, 53 Me. 442; Holyoke v. Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; Anderson v. Anderson's Estate, 42 Vt. 350, 1 Am. Rep. 334; School Directors of Borough of West Chester v. James, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525; Kirkland v. Inhabitants of Whately, 4 Allen (Mass.) 462.

[14] In re Wickes' Estate, 128 Cal. 270, 60 P. 867, 49 L. R. A. 138.

[15] Thompson v. Ewing, 1 Brewst. (Pa.) 67; Cooley, Const. Lim. (7th Ed.) § 902; Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397; McCreary El. (4th Ed.) § 116.

stitution of Texas, which provides that certain classes of persons in the state shall not have the right to vote, one of which is set out as "idiots and lunatics." [16] Inasmuch as the right of suffrage has been held to be a privilege conferred by society on certain classes of individuals, by reason of their fitness to exercise the privilege, and is not a right inherent in the individual himself, it seems to be conceded that the withholding of the ballot from the insane is a rightful exercise by society of its right to further the common good, by keeping the exercise of this high function out of the hands of a class of persons wholly unfit to exercise it.

§ 246. Degree of insanity—Extent of derangement

Just what degree of insanity would be necessary to disqualify the voter is uncertain; but the matter would likely lie largely within the sound discretion of the supervisors of the election. While a finding in lunacy would likely be prima facie evidence of such disqualification, yet the voter, or one offering himself as such, may be shown to be insane independent of any lunacy proceedings.[17] But mere weakness of mind, or hallucinations not extending to political matters, will not be sufficient to disqualify a person in such respect.[18] The usual test—i. e., that a person must have sufficient mental capacity to understand and appreciate the business he is about to enter upon—will govern; and where such a one is capable of doing ordinary work and of managing his own affairs, and is capable of understanding ordinary political matters with reference to which he will have to act in casting his ballot, he may not ordinarily be denied the right of franchise.[19]

[16] Const. Tex. art. 6, § 1.

[17] Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397; Thompson v. Ewing, 1 Brewst. (Pa.) 67.

[18] Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

[19] Clark v. Robinson, 88 Ill. 498.

§ 247. Right to hold office

A non compos person may not serve in an official capacity, or represent society in the exercise of its governmental functions. This is very obvious, for it is self-evident that one without capacity to intelligently act for himself cannot act for himself and others together. It is therefore held that he cannot hold public office or exercise the powers of the same.[20] He cannot serve as a judge or referee; and this has been carried so far as to hold that a judgment rendered by a non compos sitting in that capacity will be void and of no effect.[21] He cannot serve as a juror;[22] and, if he attempts to do so, it will be ground for setting aside the verdict rendered by him. But it seems to be held that this objection may be waived by a defendant or his attorney, by their not objecting to the juror after knowledge of the facts.[23] As corollary to the foregoing, it would seem that such an incompetent may not act as a grand juror, and service by a non compos in this capacity is expressly prohibited by the statutes of a number of states.[24] An insane person is not competent as a witness, as will be seen in a subsequent chapter.[25]

§ 248. Imprisonment for debt

In a few jurisdictions, fraudulent debtors may be imprisoned for debt by civil process called an execution against the person. Such an execution cannot ordinarily be run against the person of a non compos,[26] as its purpose of forcing the debtor

[20] Long v. Bowen, 94 Ky. 540, 23 S. W. 343.

[21] Schoenberg & Co. v. Ulman, 51 Misc. Rep. 83, 99 N. Y. S. 650, 18 N. Y. Ann. Cas. 353.

[22] Sunset Wood Co. v. Broadnax (Tex. Civ. App.) 136 S. W. 487.

[23] Mackin v. People, 115 Ill. 312, 3 N. E. 222; Douthitt v. State, 144 Ind. 397, 42 N. E. 907.

[24] U. S. v. Benson, 31 F. 896, 12 Sawy. 477; Betts v. State, 66 Ga. 508; State v. Carlson, 39 Or. 19, 62 P. 1016.

[25] See ante, § 603 et seq.

[26] Bush v. Pettibone, 4 N. Y. 300, Code Rep. (N. S.) 264; Taylor v. Van Keuren, 54 How. Prac. (N. Y.) 25.

to disclose his supposedly hidden assets would be vain, where such debtor was too mentally defective to understand the purpose thereof.

§ 249. Right to act as trustee, etc.

The rights and powers of the individual, exercised in handling the property rights of others, is, of a necessity, materially affected by his becoming insane. As a general rule, such powers on his part cease in so far as his duties in that connection call for the exercise of reason and judgment. Where the duties devolved upon him are merely automatic or nominal, the rule is not so clear. To illustrate the rule, it would seem evident that an insane person may not, in the administration of the property of another, act as guardian, executor, or administrator, inasmuch as the exercise of the duties of such offices require discretion and reason. Whether a non compos may act as trustee, however, is not so clear. It has been held that an insane person may take title as trustee, since he can take and hold property to the same extent as a normal person;[27] but we think this will be limited to cases where no administration of the trust is coupled with the holding of title, as it has been held that an inability on the part of a trustee to administer a trust on account of his mental weakness will be cause for his removal as trustee.[28]

§ 250. Financial liability

The financial status of a non compos person is affected only so far as his loss of mind affects his power to change or modify his property rights, as will be noted more fully under other heads. For much the same reason, loss of reason materially changes one's status as a debtor, as the relation of debtor means in effect a charge upon the debtor's estate. In line with this, it is held

[27] Eyrick v. Hetrick, 13 Pa. 488; Caswell v. Sheen, 69 L. T. Rep (N. S.) 854.

[28] Massey v. Stout, 4 Del. Ch. 274; Bascom v. Weed, 53 Misc. Rep. 496, 105 N. Y. S. 459; Matter of Wadsworth, 2 Barb. Ch. (N. Y.) 381.

that a person who is so insane as to be incapable of appreciating the nature of his acts cannot be charged with an act of bankruptcy, so as to bring him within the purview of the bankruptcy statute.[29] Since such a person is considered as not having sufficient mind to manage his property, he cannot be considered as having sufficient mind to commit an act of bankruptcy with reference to it. Moreover, where the act of bankruptcy partakes of the nature of fraud, as in the case of a transfer with intent to hinder, delay, or defraud creditors, an actual intent must be shown; and, where a person is so insane that he does not know the nature of the act, he cannot entertain an intent.[30] In a like manner, it is held that an insane person cannot file a voluntary petition in bankruptcy, except during a lucid interval,[31] as he has not the mind to exercise the necessary discretion. Nor would it seem that his committee may ordinarily file such a petition for him.[32] An insane person may not, therefore, become a bankrupt,[33] voluntary or involuntary, as he is without sufficient mind to do any act which may materially affect his estate, and his creditors may ordinarily be fully protected by guardianship proceedings in the probate court.

Where the non compos is in the position of a creditor in a bankruptcy proceeding, he is given six months' additional time within which to file his claim and make proper proof of the same.[34]

[29] In re Marvin, 1 Dill. 178, Fed. Cas. No. 9,178; In re Weitzel, 7 Biss. 289, 29 Fed. Cas. 609, No. 17,365; In re Ward, 161 F. 755, 20 Am. Bankr. R. 482.

[30] In re Ward, 161 F. 755, 20 Am. Bankr. R. 482.

[31] In re Eisenberg, 117 F. 786, 8 Am. Bankr. R. 551. See In re Stein & Co., 127 F. 547, 11 Am. Bankr. R. 536.

[32] In re Eisenberg, 117 F. 786, 8 Am. Bankr. R. 551. See In re Burka, 107 F. 674, 5 Am. Bankr. R. 843.

[33] See supra, § 474, 478.

[34] Bankruptcy Act, § 57n (11 USCA § 93(n).

§ 251. Imputing insanity as libel and slander

While the position or status of an insane person is one that invites protection, it is one of considerable limitations, humiliation, and loss of social prestige. As much as one may pity their unfortunate condition, yet it must be recognized that the non compos occupies a much less advantageous position in society than that of the normal person; and must of necessity have restrictions thrown around him. Therefore, from an early date it was recognized that imputing insanity to another is a "disparagement" in the same sense as imputing any other social or physical defect.[35] From this, has grown up the present rule of libel and slander based on imputing mental unsoundness.

To be affected with insanity is to be in one of the most unfortunate and painful positions known to human experience. Such an affliction deprives one of much of his freedom of action, shatters his influence with his fellows, renders him unfit to pursue any line of endeavor, and holds him up to the ridicule of the thoughtless and vicious. To lead the public to believe one is so afflicted may lead to any or all of these results; and, where such a report is without foundation, it may be one of the greatest injuries that can be inflicted. Hence it is the general rule that written or printed matter falsely imputing insanity, or any serious mental affliction, to another is actionable as a libel per se.[36] In such case, injury will be presumed from the spreading of reports so well calculated to injure the person against whom they are directed.

[35] Coke, Litt. 80, 81, 82; 18 C. J. 1277.

[36] Wood v. Boyle, 177 Pa. 620, 35 A. 853, 55 Am. St. Rep. 747; Candrian v. Miller, 98 Wis. 164, 73 N. W. 1004; Southwick v. Stevens, 10 Johns. (N. Y.) 443; Decennial and Other Key-Number Digests, Libel and Slander, ⚖6(4).

§ 252. In writing

Spoken words, imputing insanity or mental weakness to another, are actionable as slander, if damage can be shown to have arisen therefrom. But the rule in such case differs from that governing written and printed reports of a like character, in that such spoken words are not per se actionable, except where they relate to the person's business or professional character; and actual damage must be shown to have arisen from their use before a recovery can be had.[37] The reason for this distinction between the rules allowing damages in libel and slander growing out of the imputation of insanity is not clear. It is probably founded upon the idea that idle words spoken are not ordinarily given the force and credit, and have not the potential capacity to injure, as have words deliberately reduced to writing and permanently exposed to the public eye.

§ 253. Imputing intemperance, liability for

As a general rule, both spoken and written words imputing drunkenness, while not actionable per se, unless aimed directly at one's business or to charge him with crime, are actionable as libel or slander, where actual damages are shown.[38] Practically all that has been said with respect to imputing intemperance in the use of intoxicating liquors will apply to the imputing of intemperance in the use of drugs. Charging use of drugs, when untrue, is not actionable per se, but becomes so when actual damages can be shown.[39] Libel and slander growing out of such charges are, of course, governed by the usual rules of law relating to such actions, and may be excused by the same pleas.

[37] Count Joannes v. Burt, 6 Allen (Mass.) 236, 83 Am. Dec. 625; Mayrant v. Richardson, 1 Nott & McC. (S. C.) 347, 9 Am. Dec. 707; Moore v. Francis, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810.

[38] 36 C. J. 1169, 1201; Torres v. Huner, 135 N. Y. S. 332, 150 App. Div. 798; Lodge v. O'Toole, 20 R. I. 405, 39 A. 752.

[39] King v. Sassaman (Tex. Civ. App.) 54 S. W. 304.

CHAPTER 9

STATUS WITH REFERENCE TO PROPERTY RIGHTS

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§ 254. Property rights in general

The effect of insanity upon the status of the individual with respect to his property rights depends very largely upon what rights are involved and to what extent he is attempting to exercise them. He may, as a rule, take and hold property as a normal person either by deed, gift, or inheritance,[1] since there is no practical reason, involving his own good or the public welfare, which would forbid his doing so, provided there is no added burden thereby placed upon the non compos.[2] The rule applies equally to real and personal property;[3] and applies to conveyances to a trustee for the benefit of an insane person, as well as to the insane person direct, acceptance on the part of the insane person being presumed by the acquiescence of all parties.[4] This right of the insane person to take and hold property is so far recognized in principle that no statute may be passed forbidding their taking title to property unless their own welfare, the safety of their fellows, or some requirement of public policy makes it imperative. In this connection, it is reasoned that such an insane person has not, by reason of his affliction, forfeited the guaranties and privileges of organized society as in the case of a criminal, and that any attempt to arbitrarily interfere with his property rights will be objectionable as class legislation.[5] It is even held that a non compos may acquire title to property by adverse possession, where he is mentally capable of forming an

[1] Campbell v. Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. St. Rep. 479; Anonymous, Jenk. 299, 145 Eng. Reprint, 218.

[2] Campbell v. Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. St. Rep. 479.

[3] Decennial and Other Key-Number Digests, Insane Persons, ⚿ 59; 32 C. J. 725.

[4] Perry, Trusts (4th Ed.) § 56; Eyrick v. Hetrick, 13 Pa. 494.

[5] Stratton Claimants v. Morris Claimants, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70.

intent to so hold such property, or where the statute has commenced to run before his lapse into insanity.[6] Title to property is so far recognized as vesting in the non compos that a guardian may be guilty of conversion, the legal and equitable title to the property being in the insane ward subject only to the management and control of the guardian for the purposes of the guardianship. In the absence of a positive rejection of a conveyance on the part of a non compos, of course the usual presumption of acceptance will control.[7]

§ 255. Exercise of property rights in general

It has been held that, where there is a valid consideration, a non compos may take and hold property, unless the sale is avoided by the grantee or his heirs; the administrator of the grantee not being authorized to do so.[8] But with respect to the disposition of property the rule is materially different. His peculiar helpless condition renders him unfit to look after his best interests in such a transaction, and as a matter of public policy the law will only recognize an insane person's right to divest himself of property rights to a very limited extent, and will practically deny such rights where the non compos is under guardianship, and the intrusting of the transaction of his affairs to his owns hands is no longer a matter of necessity.[9]

§ 256. Conversion

Conversion is the idealistic procedure under which, for practical purposes, personal property is treated as though changed into real property, and vice versa.[10] It is founded upon the equi-

6 Cathcart v. Matthews, 91 S. C. 464, 74 S. E. 985, Ann. Cas. 1914A, 36; Freeman v. Funk, 85 Kan. 473, 117 P. 1024, 46 L. R. A. (N. S.) 487.

7 Campbell v. Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. St. Rep. 479.

8 Campbell v. Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. St. Rep. 479.

9 See ante, § 264.

10 Simpkin's Equity, p. 364; Pom. Eq. Jur. § 1159; Black, Law Dict. tit. "Conversion"; Bouv. Law Dict. tit. "Conversion."

table maxim that "that is considered as done which ought to be done." It represents the effort of the law to carry out the will of a donor or devisee of property, who has directed that the property be converted from personalty into realty, or the converse, in order to carry out a designated purpose. Its practical application comes in where the rules of law governing the two classes of property are different; and in such cases the law treats the property in question as belonging to the class of property the donor or devisee intended it to finally belong to, without reference to present character of the property itself. In brief, the law will treat the property as if the intention of changing the nature of the property has already been carried out. As the doctrine of conversion is founded upon the intention of the person disposing of the property, it is clear that it has no application where such person is incapable of forming an intelligent intention with reference to such property. Therefore, as a general rule, it does not apply to a person non compos mentis, especially where it would not be to the best interest of such incompetent grantor.[11] Where the grantee only is insane, there would seem to be no reason why the intention of the grantor should not be carried out with respect to him, under the general rule that the insane may take property as a normal person, in the absence of unreasonable burdens being attached to it.

§ 257. Election

Election is a choice between two rights. It usually arises where the rights are inconsistent, so that the person entitled to the election will not be entitled to both, but must select between them. It is obvious that one who is without reason and understanding is incapable of understanding and appreciating the relative rights involved, so as to make an intelligent choice. For example, where he has the election to sue for specific performance of a contract, or for damages for its breach, he might have to exercise

[11] In re Tugwell, 27 Ch. D. 309, 53 L. J. Ch. 1006, 51 L. T. Rep. (N. S.) 83; 33 Wkly. Rep. 132; Lloyd v. Hart, 2 Pa. 473, 45 Am. Dec. 612.

considerable discretion in making a wise choice between the two. It is therefore generally held that an insane person cannot make a valid election that will bind him, and especially where an attempted election on his part is not for his best interests.[12] Election with reference to rights in real estate is considered more at length ante.[13]

§ 258. License

License is the privilege given another to do certain act or acts upon the land of the licensor without carrying with it any actual estate in such land.[14] It may involve very valuable rights, and operate as a burden upon the property, and is founded upon the intelligent assent of the licensor in granting or giving assent to the exercise of the right. It is evident, therefore, that an intelligent understanding is necessary, in order that the licensor may appreciate what he is granting or assenting to, and that a non compos should not be allowed to grant a license that might be a burden to his estate or operate to his detriment. As a license is founded upon the continued consent of the grantor, and may, usually, be revoked by him at pleasure, the subsequent insanity of the licensor will ipso facto operate as a revocation of the license.[15]

§ 259. Waiver

Waiver is the intentional relinquishment of some right, claim, or privilege upon the enforcement or observance of which a person has the right to insist.[16] It is apparent that a rational exercise of the intelligence is necessarily involved in understand-

[12] In re Barker, 17 Ch. D. 241, 50 L. J. Ch. 334, 44 L. T. Rep. (N. S.) 33; 29 Wkly. Rep. 873; Dowlin v. Boyd (Tex. Com. App.) 291 S. W. 1096.

[13] See ante, § 273.

[14] Howes v. Barmon, 11 Idaho, 64, 81 P. 48, 69 L. R. A. 568, 114 Am. St. Rep. 255; Decennial and Other Key-Number Digests, tit. Licenses, ⊂⇒43.

[15] Berry v. Potter, 52 N. J. Eq. 664, 29 A. 323.

[16] Roberts v. Moss, 127 Ky. 657, 106 S. W. 297, 17 L. R. A. (N. S.) 280.

ing the existence and extent of the right, claim, or privilege, and in making a choice between a forbearance and enforcement of the same. As a non compos person is incapable of appreciating such rights, or of making an intelligent choice, it is evident that he cannot ordinarily be charged with a waiver as here used, and especially where the waiver operates to his disadvantage.[17] The same rule applies to the purported abandonment of property rights by a non compos owner.[18]

§ 260. Estoppel

Estoppel is enforced where conditions arise through the conduct of a party to a transaction which make it inequitable to allow him to change or deny that which he has already done. Estoppel may arise by record or deed, or from inequitable conduct.[19] Just how far the doctrine of estoppel will apply to persons non compos mentis is not clear, as the decisions on the subject are few, and are more or less in conflict. It seems to be held that whether estoppel by record or deed will apply to an insane person will depend upon the binding force given such record or deed in the jurisdiction in question, and whether it is depended upon by the non compos as a link in his chain of title.[20] In jurisdictions where deeds executed by insane persons are considered as being wholly void, the estoppel will likely have no effect against the non compos, since one cannot be estopped by an act itself void; but in those jurisdictions where the deed of the non compos is considered voidable only, especially when made prior to being placed under guardianship, estoppel will likely arise therefrom, especially where the rights of innocent purchasers have intervened.[21] With reference to equitable estoppel, or es-

[17] See ante, § 273 et seq.

[18] White's Guardian v. Martin, 2 Alaska, 495; Cathcart v. Matthews, 105 S. C. 329, 89 S. E. 1021.

[19] Simpkin's Equity, p. 668.

[20] Rogers v. Walker, 6 Pa. 374, 47 Am. Dec. 470; Rusk v. Fenton, 14 Bush (Ky.) 490, 29 Am. Rep. 413.

[21] Rusk v. Fenton, 14 Bush (Ky.) 490, 29 Am. Rep. 413.

toppel in pais, the rule seems more uniform. As estoppel of this nature is the outgrowth of inequitable conduct which involves a wrong intent, and an insane person is presumed to be incapable of entertaining such an intent, estoppel of this kind would not ordinarily apply to non compos persons,[22] inasmuch as it does not apply to persons sui juris.[23]

§ 261. Personal property

The control of the non compos over his personal property is restricted, though somewhat broader than his control over and disposition of his real estate. Where he is not under guardianship, his control over such property is large; and he may even dispose of it, subject to a right to rescind such sale, gift, etc. Where he is under guardianship, his control over such property is much more limited. For example, it has been held that, where he is under guardianship, the non compos may not collect the proceeds of notes on hand, and that, where they have been paid to the ward, the guardian may re-collect them, even when the notes are in the ward's hands and payable to him on their face.[24] Similarly, the insanity of an inventor will not destroy or materially affect his rights in a patent to which he is entitled. Where the insanity occurs after the patent right is secured, such patent right is held to be governed by the usual rules applicable to personal property and is unaffected by the insanity of the inventor. In such case his rights in the matter pass to his personal representatives, who may apply for and obtain the patent to be held in trust for him.[25] Where such a person can make a sale of personal property directly, he can do so indirectly through another, by making such other person his attorney in fact, and a sale so made will have the same force as that made directly by the non

22 Bigelow, Estoppel, § 486.

23 Harper v. Utsey (Tex. Civ. App.) 97 S. W. 508; Bank of America v. Banks, 101 U. S. 240, 25 L. Ed. 850; Starr v. Long Jim, 52 Wash. 147, 100 P. 197; Simpkin's Equity, 681.

24 Leonard v. Leonard, 14 Pick. (Mass.) 280.

25 35 USCA 46.

compos; that is, the sale will ordinarily be voidable at the option of the insane grantor, and will remain valid until disaffirmed.[26]

§ 262. Real property

The extent of an insane person's control over his real property varies in the different jurisdictions, and depends to a large extent upon whether such non compos is under guardianship. In those jurisdictions where the courts favor a strict application of the rule that the acts of one having no mind to contract are wholly void, the extent of such control is very limited; and where a guardian has been appointed to act for the non compos, of which the whole world is charged with notice, the tendency is to take a corresponding amount of control from the ward, with the result that very little power is left in the hands of the ward. The most universal rule, however, would seem to be that, where the non compos is not under guardianship, his right of control over his property is, for all practical purposes, more or less recognized, subject to the review of the courts where he has been the object of imposition or has acted to his own prejudice. Reference must be had to specific applications of the rule.

§ 263. Power to convey real estate, in general

The rules with reference to the conveyance of real estate by a person non compos mentis have been a matter of dispute since the early history of the common law in England. The confusion seems to have arisen out of the different rules applied to the first modes of conveyance of land, viz., feoffment and deed of surrender. In an early case,[27] it was first decided that all such conveyances made by an insane person were voidable only, and this view was adopted by Blackstone in his Commentaries,[28] and other common-law writers;[29] but in the leading case of Thompson

[26] Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115.
[27] Beverly's Case, 4 Coke, 123, b.
[28] 2 Bl. Comm. p. 291.
[29] 2 Kent, Com. (14th Ed.) 451.

v. Leach,[30] followed by the House of Lords in the case of Ball v. Mannin,[31] a distinction was made between conveyances by feoffment and by deeds, conveyances, etc. A conveyance by a lunatic by feoffment was declared to be voidable only, because it carried with it livery of seisin and was done in person and usually before witnesses, by which means imposition on the incompetent grantor was guarded against to a large extent; but conveyances by lunatics by mere deeds of release, sales, or conveyances were declared to be absolutely void, not merely voidable.[32] By subsequent legislation, conveyances by feoffment were placed on the same footing as conveyances by deed.[33]

In the courts of America, the variance of opinion among the early authorities in England has caused considerable confusion. While the reason for the early distinction ceased with the abolishment of feoffment conveyances, the distinction previously made persisted, and has been carried into the American decisions. In some of the states, especially in the earlier decisions, it seems to be held that a deed made by an insane person, and purporting to convey real estate, is absolutely void and without force as a conveyance of title.[34] But in a seeming majority of the states, a deed by such a person is held to be voidable only, and they have even been held to be valid and binding, where fair to the insane grantor.[35] By the decided weight of authority in the United States, a conveyance, or contract for conveyance, of real estate, made by an insane person not under guardianship, is voidable only, and sufficient to convey title until set aside at the instance of the non compos grantor or his heirs and personal

[30] Carthew, 438, 468; Comberbach, 211, 235; 3 Salk. 300.

[31] 1 Dow & C., 380.

[32] 1 Sugd. Powers, 179; Shelf. Lunatics, 257–259.

[33] 7 and 8 Vict. c. 76, § 7.

[34] Elder v. Schumacher, 18 Colo. 433, 33 P. 175; Sullivan v. Flynn, 9 Mackey (20 D. C.) 396; Brown v. Miles, 61 Hun, 453, 16 N. Y. S. 251; Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73; Farley v. Parker, 6 Or. 105, 25 Am. Rep. 504; Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470.

[35] Imperial Loan Co. v. Stone, 1 Q. B. 599; Myers v. Knabe, 51 Kan. 720, 33 P. 602.

representatives.[36] In some of the states there has been a tendency to rest the question of whether a conveyance executed by an insane person is void, or merely voidable, upon the degree of mental incapacity, holding that such conveyances are void where the grantor has no understanding whatever, and are merely voidable where he is feeble-minded only.[37] In at least one state, this rule seems to be based upon interpretation of local statutes.[38] This distinction has not met with any general favor, and is of local application only.

Usually the voidableness of such a deed cannot be reached in a collateral proceeding or by a stranger.[39] Since only the non compos or his personal representatives and heirs can take advantage of it, a deed executed under these circumstances will be superior to a judgment lien.[40] It is held in this connection that a judgment of lunacy cannot be made the basis for setting aside

[36] French Lumbering Co. v. Theriault, 107 Wis. 637, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856; Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115; Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S. W. 247, L. R. A. 1916D, 924; Riley v. Carter, 76 Md. 581, 25 A. 667, 19 L. R. A. 489, 35 Am. St. Rep. 443; Walton v. Malcolm, 264 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021; Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505; Eagle v. Peterson, 136 Ark. 72, 206 S. W. 55, 7 A. L. R. 553; Allred v. Smith, 135 N. C. 443, 47 S. E. 597, 65 L. R. A. 924; Ætna Life Ins. Co. v. Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; Cochran Timber Co. v. Fisher, 190 Mich. 478, 157 N. W. 282, 4 L. R. A. 9; Brown v. Brown, 209 Mass. 388, 95 N. E. 796; Green v. Hulse, 57 Colo. 238, 142 P. 416.

[37] Van Deusen v. Sweet, 51 N. Y. 378; Adams Oil & Gas Co. v. Hudson, 55 Okl. 386, 155 P. 220; French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856.

[38] Adams Oil & Gas Co. v. Hudson, 55 Okl. 386, 155 P. 220, supra.

[39] Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Eaton v. Eaton, 37 N. J. Law, 108, 18 Am. Rep. 717; Pearson v. Cox, 71 Tex. 246, 9 S. W. 124, 10 Am. St. Rep. 740.

[40] French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856.

a prior conveyance.[41] Following the usual rule of contracts, the insanity of the grantee cannot be taken advantage of by the grantor, himself sane, to set aside such a conveyance; but the insanity of the grantee may be shown to explain and set aside an unintended transfer. For example, it has been held that the insanity of a grantee in a deed may be shown to explain and show reason for setting aside a deed made to humor the whim of an insane person, but not intended to actually convey the title to the property.[42]

§ 264. When under guardianship

Where the insane grantor in a deed is under guardianship, or has been declared insane by regular judicial proceedings, the courts are inclined to apply a different rule. As in the case of the general rule governing conveyances of property by an insane person, the authorities are very much at variance and seemingly in conflict. Various attempts have been made to reconcile the decisions on the subject, with the result that two rules have been evolved, based on the effect of adjudication of insanity with reference to its conclusiveness in the jurisdiction in question.

Under the first group of decisions it is held that a deed, executed after the grantor has been adjudged insane or placed under guardianship, will be voidable only,[43] and that adjudication of lunacy will be only prima facie evidence of the grantor's insanity and of the voidability of the instrument of conveyance. In such cases, the judgment of lunacy in that jurisdiction is, as a rule, held not to be conclusive of the person's sanity, except, perhaps, at the time of such adjudication, and the question of the grantor's sanity and the voidableness of the conveyance is consequently left open to inquiry. For example, it has been

[41] Uecker v. Zuercher, 54 Tex. Civ. App. 289, 118 S. W. 149; Wathens v. Skaggs, 161 Ky. 600, 171 S. W. 193.

[42] McCartney v. McCartney, 93 Tex. 359, 55 S. W. 310.

[43] Eagle v. Peterson, 136 Ark. 72, 206 S. W. 55, 7 A. L. R. 553; Barkheimer v. Lockhart, 139 Ark. 223, 213 S. W. 381; Mott v. Mott, 49 N. J. Eq. 192, 22 A. 997; Grimes v. Shaw, 2 Tex. Civ. App. 20, 21 S. W. 718; Miller v. Rutledge, 82 Va. 863, 1 S. E. 202.

held in Texas that an adjudication of insanity under the statutes of that state is conclusive evidence of insanity only at the exact time of the adjudication, and is only prima facie evidence of insanity existing at any subsequent time.[44] Therefore a deed made by a person, even after he has been adjudged to be insane, is merely voidable, not void,[45] the judgment being prima facie evidence of the grantor's insanity and consequent incompetency. Moreover, such judgment of insanity merely relates to subsequent transaction, and it cannot be made the basis for setting aside of a deed made prior thereto.[46]

Under the second group of cases, it is held that a deed executed by a person after he has been adjudged insane, and especially where he has been placed under guardianship, is absolutely void, and not merely voidable.[47] The adjudications of insanity in such jurisdictions are usually held to have the effect of declaring the subject permanently insane until his sanity is re-established by a new hearing. In such case, the status of the non compos has been fixed as *non est* so far as his contractual powers are concerned and society at large given notice of the fact. Any attempted act of the party looking to the making of a conveyance would be an attempted exercise of powers that did not exist. Moreover, the purpose and end of the guardianship would be entirely subverted, if the insane ward was allowed to act independent of the guardian. Some of the decisions have gone so far as to hold such conveyances to be void, even when

[44] Witty v. State, 69 Tex. Cr. R. 125, 153 S. W. 1146.

[45] Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Mitchell v. Inman (Tex. Civ. App.) 156 S. W. 290, writ of error refused (Sup.) 161 S. W. xv.

[46] Uecker v. Zuercher, 54 Tex. Civ. App. 289, 118 S. W. 149, writ of error denied.

[47] Wait v. Maxwell, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Rohrer v. Darrow, 66 Colo. 463, 182 P. 13; Griswold v. Butler, 3 Conn. 227; Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73; Galloway v. Hendon, 131 Ala. 280, 31 So. 603; Rogers v. Walker, 6 Pa. 371, 47 Am. Dec. 470; Gingrich v. Rogers, 69 Neb. 527, 96 N. W. 156; Farley v. Parker, 6 Or. 105, 25 Am. Rep. 504.

made in a lucid interval.[48] The second rule seems to be founded on the better reasoning. It has been held under this rule that the deed of the non compos grantor is so entirely void as to convey no title, even when unquestioned by the grantor or his representatives.[49] In other jurisdictions it has been held that some act of disaffirmance is necessary, this virtually holding that the deed would be voidable only.[50] The fact that the guardian consented to the transaction would not add any force to it.[51]

§ 265. Miscellaneous rules with reference to

Where a deed has been executed under circumstances which show the insanity of the grantor, or even where he is under guardianship, the fact cannot be taken advantage of by the opposite party to relieve himself from liability,[52] as the purpose of the rule is, of course, to protect the non compos. As corollary to this, it is held that, as against the insane person, the rights of third parties not intervening, such a deed has no standing where its recognition would give the other party an advantage. For example, it is held that such a deed would not avoid an insurance policy whose terms forbid a transfer of the real estate.[53] Mere execution of such an instrument during insanity, to the extent of signing, will not be sufficient; but it would seem that, if the deed or other instrument is acknowledged after the insanity of the grantor it will be avoided, and the existence of the insanity may be shown by parol evidence notwithstanding the certificate of acknowledgment.[54] As a general rule, the mere insanity of the grantor in such instrument is not conclusive, as it may have been

[48] In re Walker, 1 Ch. 160, 4 B. B. C. 432.

[49] Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512.

[50] Schuff v. Ransom, 79 Ind. 458.

[51] Rannells v. Gerner, 80 Mo. 474.

[52] San Francisco Credit Clearing House v. MacDonald, 18 Cal. App. 212, 122 P. 964.

[53] Gerling v. Agricultural Ins. Co., 39 W. Va. 700, 20 S. E. 691.

[54] 1 C. J. 890.

executed during a lucid interval, and, where that fact can be shown, the deed or conveyance will hold valid.[55] Where insanity occurs after an offer of sale on the part of an insane person, but before such offer is accepted by the other party to the transaction, such subsequent insanity operates as a revocation of the offer on the part of the insane person.[56]

§ 266. Other conveyances

The validity of other forms of conveyances by an insane grantor usually depends upon the purpose of such conveyances and their effect upon the property of the non compos. Thus it is held that an exchange, or attempted exchange, of land by the non compos with another, will be governed by the same rules as relate to sales of land by the insane, inasmuch as the effect on the relative rights of the parties would be much the same.[57] But a conveyance by an insane person in trust is usually held to be voidable only, and will be set aside only where it is unfair and unreasonable, and the parties can be restored to their original position; i. e., placed *in statu quo*.[58] But a non compos may not ordinarily be trustee, or act in that capacity in the conveyance of real estate, where the carrying out of the trust requires the exercise of judgment and discretion, and where the trust is so vested in him, and he is required to exercise it, it must be administered by his guardian or committee.[59] Similarly, it is held that a release executed with reference to real estate by one so mentally unsound as to be unable to understand and appreciate the nature and result of the act will be voidable.[60]

55 Ramsdell v. Ramsdell, 128 Mich. 116, 87 N. W. 81.

56 39 Cyc. 1189.

57 Halley v. Troester, 72 Mo. 73.

58 Perry on Trusts (4th Ed.) § 35.

59 Perry on Trusts (4th Ed.) § 56; Person v. Warren, 14 Barb. (N. Y.) 488; Webb v. Dietrich, 7 Watts & S. (Pa.) 401.

60 Spycher v. Werner, 74 Wis. 456, 43 N. W. 161, 5 L. R. A. 414; Decennial and Other Key-Number Digests, tit. Release, ⊜58(4).

§ 267. Partition

While the insanity of one cotenant will not have the effect of preventing a partition of land owned jointly by them, it may materially affect a voluntary partition already made between themselves. Thus it is held that, where a voluntary partition has been made between such parties, the non compos assenting to it, the partition will be allowed to stand only when consistent with the best interests of the non compos; and where it does not appear to be to his best interests, or where tinged with fraud or imposition, it will be reviewed by courts of equity, and the partition set aside or the property repartitioned, so as to be equitable to both parties.[61] But, as indicated above, the mere insanity of one of the cotenants will not bar the right to partition the property. The other cotenant may demand a partition, and may institute the proper proceedings to secure it;[62] or the non compos may demand such a partition and enforce it in an action brought either through his regularly appointed guardian, if there be one, or through another as next friend.[63] Under the English practice, the partition, where demanded by the other parties, was affected by decreeing the insane person to hold the property in trust for the other cotenants or by authorizing a conveyance by the guardian.[64] This latter method would seem to be more in line with the American practice and would likely be adopted.

§ 268. Extent of insanity

Mere weakness of the mind will not be sufficient to avoid a deed on the ground of insanity,[65] but a subversion of the mind is necessary. The measure of the capacity of a person to execute a

[61] 30 Cyc. 156.

[62] Sallier v. Rosteet, 108 La. 378, 32 So. 383; Murdock v. Loeser, 87 S. W. 808, 27 Ky. L. Rep. 1057; Bryant's Heirs v. Stearns, 16 Ala. 302; Gorham v. Gorham, 3 Barb. Ch. (N. Y.) 24.

[63] 30 Cyc. 197.

[64] 30 Cyc. 213.

[65] 18 C. J. 218.

conveyance of real estate—e. g., a deed to land—is generally expressed as the ability of the grantor to "comprehend the nature and effect of his acts." [66] Besides this statement of the rule, which seems to have been adopted by a majority of the courts, there are various forms of expression used by the courts of the several states, but which seem to contain certain elements common to all, viz.:

(a) Lack of understanding

First. There must be mental capacity, or ability, to understand and appreciate the nature of the act about to be entered upon; that is, that it is a *conveyance* of property.

(a) There need be capacity only. As in case of wills, the test is not whether the person has actual knowledge, but whether he has capacity to know.[67] The amount of capacity is one of fact in the particular case, and cannot be measured by comparison, as, for example, that it would take more mental capacity to execute a deed than it would to make a will.[68]

(b) The incapacity must exist at the time of the transaction, and the mental condition of the subject at other times is merely competent as tending to throw light on the person's mental condition at the time the conveyance is made.[69] For example, a conveyance may be legally executed by such a person during a lucid interval, where the required amount of mental capacity is shown during such time; [70] and, conversely, the deed of an ordinarily sane person may be executed during a temporary mental aberration sufficient to fall short of the test of mental capacity, will be invalid.[71]

[66] Decennial and Other Key-Number Digests, Deeds, ⟸68 (1½) a; Spurlock v. Noe, 43 S. W. 231, 19 Ky. Law Rep. 1321, 39 L. R. A. 775.

[67] Bowdoin College v. Merritt (C. C.) 75 F. 480.

[68] Bond v. Branning Mfg. Co., 140 N. C. 381, 52 S. E. 929.

[69] Delaplain v. Grubb, 44 W. Va. 612, 30 S. E. 201, 67 Am. St. Rep. 788.

[70] McPeck v. Graham, 56 W. Va. 200, 49 S. E. 125.

[71] Fisher v. Fisher, 12 Neb. 416, 11 N. W. 864.

(c) The incapacity should be with reference to the act, or acts, in question; that is, the inquiry should be directed to the person's capacity to understand and appreciate what he is doing in the *particular transaction* in question. Therefore one may make a valid conveyance, although he is at the time unbalanced on some other subject, provided such delusions do not affect his understanding with reference to the making of the conveyance, or, as it has been expressed, the delusion in question must have "been the moving cause of the act which would not have been done except for such delusions." [72]

(d) There must be mental capacity to understand and appreciate the *nature* of the transaction in question. It is not necessary that grantor should understand the exact legal import and effect of the words employed in the deed, so long as he understands that he is making a conveyance, and that the instrument he is executing is a conveyance, as understood and intended by him.[73]

(e) He must have sufficient mental capacity to understand and appreciate the nature of the matter with reference to the subject-matter of the conveyance. In other words, as a necessary ingredient of the transaction itself, he must have sufficient mental capacity to hold in his memory the amount and nature of the property he purports to convey, sufficiently long to enable him to exercise his will with reference to its disposition.[74] By this is meant something more than a mere habit of forgetfulness, as that will not serve to avoid a deed.[75] The lapse of memory must arise from mental weakness. Where the deed or conveyance is in the nature of a gift, it has been held that the grantor must also have mental capacity to hold in memory the extent of his prop-

[72] Meigs v. Dexter, 172 Mass. 217, 52 N. E. 75; Reese v. Shutte, 133 Iowa, 681, 108 N. W. 525.

[73] Moorehead v. Scovel, 210 Pa. 446, 60 A. 13.

[74] Bond v. Branning Mfg. Co., 140 N. C. 381, 52 S. E. 929; Hayman v. Wakeham, 133 Mich. 363, 94 N. W. 1062.

[75] Bowdoin College v. Merritt (C. C.) 75 F. 480.

erty and those who are the natural objects of his bounty;[76] that is to say, he must have capacity to realize that he is passing title to an appreciable portion of his property to some other than those who would ordinarily receive it by inheritance.

(b) Lack of power of choice

Second. He must have sufficient mental capacity to understand and appreciate the effect of his act and to exercise a freedom of will with reference to it.

(a) He must be able to know what he is doing; i. e., that he is making a transfer of the title to his property.[77] The force of this can readily be seen, as one cannot exercise a rational choice with reference to a sale of property, where he does not know that he is actually parting with title and possession of the same.

(b) He must have the mental capacity to exercise a freedom of will in the transaction. There must be sufficient mental strength to render the person capable of making the conveyance as the result of a fixed purpose of his own, rather than from the prompting of an irrational impulse or the overshadowing will of another.[78] In this connection, it is held that a much less degree of mental weakness will suffice to avoid a deed or other conveyance, where the weakened will of the grantor is influenced by the fraud or importunity of another, so that the grantor is deprived of his freedom of choice.[79]

[76] Pepple v. Pepple, 13 Ohio Cir. Ct. Rep. 43, 7 Ohio Dec. 102; Bowdoin College v. Merritt (C. C.) 75 F. 480; Dean v. Dean, 42 Or. 290, 70 P. 1039.

[77] Mann v. Keene Guaranty Sav. Bank of Keene, N. H., 86 F. 51, 29 C. C. A. 547; Ramsdell v. Ramsdell, 128 Mich. 110, 87 N. W. 81; Beverage's Committee v. Ralston, 98 Va. 625, 37 S. E. 283.

[78] Garner v. Garner, 4 Ky. Law Rep. 823; Hayman v. Wakeham, 133 Mich. 363, 94 N. W. 1062.

[79] Sedgwick v. Jack, 111 Iowa, 745, 82 N. W. 1027; Yount v. Yount, 144 Ind. 133, 43 N. E. 136.

§ 269. Test of business capacity

In some of the cases dealing with the mental capacity of a grantor to make a deed, the ability to transact ordinary business is spoken of as the measure of a person's capacity to execute a deed;[80] but in others this seems to be denied, the latter holding that mere mental weakness, rendering one incapable of prudently and judiciously transacting business, will not, in the absence of fraud or imposition, render him incapable of making a deed.[81] Inasmuch as the mere fact that a person through mental weakness has made a bad trade in the transfer or sale of his property will not, in the absence of fraud or imposition, of itself operate to vacate a transfer,[82] it would seem that ability to transact ordinary business affairs could not furnish a rule applicable to all conditions, and we would suggest that evidence of such ability, or want of ability, would merely be taken with other circumstances as tending to show the true mental condition of such grantor, and that capacity to make a deed or conveyance will depend upon the facts of each particular case measured by the general rule we have above considered.

§ 270. Undue influence—Effect of

It is not infrequently true that a person has sufficient mental capacity to meet the test required to enable him to execute a conveyance of property, and knows and understands what he is doing, yet is so mentally weak as to be an easy prey to persons who may seek to influence his weak mind and will to their own advantage. Such an act in inducing a contract or conveyance par-

[80] Ring v. Lawless, 190 Ill. 520, 60 N. E. 881; Nichols v. King, 68 S. W. 133, 24 Ky. Law Rep. 124; Hoey v. Hoey, 65 N. Y. S. 778, 53 App. Div. 208.

[81] Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249.

[82] Oxford v. Hopson, 73 Ark. 170, 83 S. W. 942; Paulus v. Reed, 121 Iowa, 224, 96 N. W. 757; Tichy v. Simecek, 4 Neb. (Unof.) 597, 95 N. W. 629.

takes very much of the nature of fraud, and is sometimes spoken of as such by the courts. However, to operate as an avoidance of a conveyance made under its influence, the undue influence must amount to a coercion or overruling of the will and judgment of the person upon whom it is exercised, destroying his free agency and subverting him to the will of the person exercising the influence. In other words, the non compos stands *in vinculis*. But such influence must be a present, coercive influence, acting at the time of the execution of the deed or conveyance, and the rule applies alike to all manner of conveyances.[83]

As the law is especially tender of relations that naturally give one party the confidence of the other, this rule applies with special force where the person exercising the undue influence stands in a fiduciary relation to the non compos, as, for example, where such party is trustee, attorney, physician, parent, nurse, etc., and the exercise of such influence may be implied from the existence of such relation without actual proof of such influence having been exercised.[84] The burden of proof is upon the grantee in such contract or conveyance to show that the conveyance was not executed under undue influence or by overreaching on the part of the grantee.[85] It is questionable whether this rule will apply to parents, and the weight of authority seems to hold that

[83] Central Bank of Frederick v. Copeland, 18 Md. 305, 81 Am. Dec. 597; Brannin v. Sherley, 91 Ky. 450, 16 S. W. 94; Conley v. Nailor, 118 U. S. 136, 6 S. Ct. 1001, 30 L. Ed. 115; Millican v. Millican, 24 Tex. 445.

[84] Millican v. Millican, 24 Tex. 426; Harding v. Handy, 24 U. S. (11 Wheat.) 103, 6 L. Ed. 430; Turner v. Turner, 44 Mo. 535; Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431; Bayliss v. Williams, 6 Cold. (Tenn.) 440; Fuller's Adm'r v. Fuller, 40 Ala. 301; Greer v. Greer, 9 Grat. (Va.) 330.

[85] Pom. Eq. Jur. 955–958; 1 Story, Jur. §§ 321, 322; Cowee v. Cornell, 75 N. Y. 100, 31 Am. Rep. 428; Gillespie v. Holland, 40 Ark. 28, 48 Am. Rep. 1; Emery v. Parrott, 107 Mass. 100; Shipman v. Furniss, 69 Ala. 555, 44 Am. Rep. 528; Nobles v. Hutton, 7 Cal. App. 22, 93 P. 293.

it does not.[86] It has been said that undue influence may be inferred from the absence or inadequacy of the consideration in a conveyance by an insane person or a person of weak mind. While it has been held that, strictly speaking, an adequate consideration is not necessary to render such a transaction valid,[87] yet the matter, especially where the person of weak mind is the loser in the transaction, is viewed with much disfavor by the courts; and as a result, where an absence or gross inadequacy of consideration, coupled with weakness of mind on the part of the grantor, appear in the same transaction, they will be taken as a combination of facts from which undue influence may be inferred without further proof of its actual existence.[88]

§ 271. As grounds for equity jurisdiction

Some of the courts go much further than we have indicated above and apparently hold that equity will interfere to set aside a conveyance made by an insane person where such conveyance is not supported by consideration, or where the consideration is inadequate, and this without reference to the good faith of the person to whom the conveyance is made.[89] This is especially true, where the grantee had notice of the grantor's mental condition at the time of the conveyance,[90] and it is held that even an

86 Beville v. Jones, 74 Tex. 153, 11 S. W. 1130; Soberanes v. Soberanes, 97 Cal. 145, 31 P. 912; Clark v. Clark, 174 Pa. 338, 34 A. 617. See, also, 16 L. R. A. (N. S.) 1096.

87 Sturtevant v. Sturtevant, 116 Ill. 340, 6 N. E. 428.

88 Ellis v. Mathews, 19 Tex. 390, 70 Am. Dec. 353; Waddell v. Lanier, 62 Ala. 347; Harris v. Wamsley, 41 Iowa, 671; McLean v. Equitable Life Assur. Soc. of United States, 100 Ind. 127, 50 Am. Rep. 779; Moore v. Moore, 56 Cal. 89; Ikerd v. Beavers, 106 Ind. 483, 7 N. E. 326; Cole v. Cole, 21 Neb. 84, 31 N. W. 493; Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260; Banker v. Hendricks, 24 S. C. 1.

89 Alexander v. Haskins, 68 Iowa, 73, 25 N. W. 935; Potter v. Woodruff, 92 Mich. 8, 52 N. W. 83; Maggini v. Pezzoni, 76 Cal. 631, 18 P. 687; Sander v. Savage, 75 App. Div. 333, 78 N. Y. S. 189, 11 N. Y. Ann. Cas. 433; Decennial and Other Key-Number Digests, tit. Insane Persons, ⇐61.

90 Alexander v. Haskins, 68 Iowa, 73, 25 N. W. 935.

innocent purchaser from such grantee, who will be considered as holding the title merely as trustee for the benefit of the non compos person, cannot retain the property so conveyed.[91] It is immaterial whether there is any fraud in the transaction, inasmuch as the basis for avoiding is the absence or inadequacy of the consideration.[92] The rule we have here discussed can likely be distinguished from the one mentioned in the preceding paragraph, in that this rule is to be applied to conveyances made by persons legally insane, while the first rule applies to where there is a mere weakness of the mind not amounting to actual insanity, yet sufficient to be taken cognizance of when overreached. The difference in the rules is found in the reason thereof. Equity will not allow a non compos, who is unable to appreciate the nature and result of his act, to convey his property to another without any advantage to himself. The right of conveyance is primarily founded upon the right of the individual to exercise his own discretion as to what is his best advantage in handling property. Where the mind is merely weak, but the judgment is not actually subverted the courts cannot interfere, in the absence of fraud or undue influence. But a person actually insane is without discretion, and, not being able to exercise any discretion whatever in such attempted conveyance, will be held to be without the right to execute the same. This restriction is somewhat relaxed from the necessity of allowing the non compos without guardian to contract, so far as to provide necessities for himself and those dependent upon him and the protection and preservation of his property, which is without other custodian, and where he changes his property into a fair medium, which will enable him to do this, the transaction will be allowed to stand. But

[91] Valentine v. Lunt, 3 N. Y. S. 906, 51 Hun, 544. See Hull v. Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405.

[92] Maggini v. Pezzoni, 76 Cal. 631, 18 P. 687; Dowlin v. Boyd (Tex. Com. App.) 291 S. W. 1096; Clay v. Clay's Committee, 179 Ky. 494, 200 S. W. 934; Potter v. Woodruff, 92 Mich. 8, 52 N. W. 83; Hull v. Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405.

where there is no such fair exchange, and nothing given him which will allow him to satisfy his material necessities, the reason for allowing such exception will fail, and the general rule avoiding such conveyances will have effect.

§ 272. Fraud or imposition, as affected by

Yet another example of the attempt on the part of the courts to protect the non compos in the conveyance of his property is presented in those cases where the courts of equity have taken jurisdiction by exercise of writs in lunatico inquirendo in cases having to do with deeds made by persons thought to be non compos, to the end that the fairness of the transaction might be examined into. But here something more than mere mental unsoundness must be shown. It must appear that there was imposition or fraud practiced upon the insane person, to which he would be peculiarly susceptible because of his mental weakness;[93] or, coupled with the showing of mental unsoundness, it must appear that the transaction was unfair and inequitable as to the non compos.[94]

§ 273. Affirmance and disaffirmance

A conveyance by an insane person, which may be void or voidable because of the incompetency of the grantor, may be subsequently affirmed or ratified, and in case of a conveyance which is voidable only it should be disaffirmed in order for effect to be given to such incompetency. In case of affirmance, it may be made by the non compos who has regained his reason, and in some cases by certain others who are authorized to act for him, and in

[93] Churchill v. Scott, 65 Mich. 485, 32 N. W. 737; Davren v. White, 42 N. J. Eq. 569, 7 A. 682; Kimball v. Cuddy, 117 Ill. 213, 7 N. E. 589.

[94] Brigham v. Fayerweather, 144 Mass. 48, 10 N. E. 735; Leonardson v. Hulin, 64 Mich. 1, 31 N. W. 26; Morton v. Morton (N. J. Eq) 8 A. 807; Odell v. Buck, 21 Wend. (N. Y.) 142; Jackson ex dem. Cadwell v. King, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354; Edwards v. Edwards, 14 Tex. Civ. App. 91, 36 S. W. 1080.

case of disaffirmance it may be made by the non compos whether he recovers his reason or not, but in the latter case he should usually act through his representatives, where there are such, or through another as next friend, where there is no regularly appointed guardian or committee. After his death, it may in some cases be made by his heirs.[95]

§ 274. Affirmance, in general

After his recovery, it is the privilege of the non compos to affirm or disaffirm a transaction rendered voidable by reason of having been executed during his incompetency.[96] Whether this is equally true of a void transaction is not so clear. But in the case of the former, at least, he must do one or the other. So true is this that in some jurisdictions an affirmance may be presumed from mere acquiescence, but not where the conveyance was without consideration.[97] Also, affirmance may be inferred from acts of non compos after his recovery, which are inconsistent with the idea of disaffirmance on his part and which tend to show a recognition on his part of the prior conveyance. An example of this is seen where he acts on the stipulations in a deed favorable to himself, or where he accepts unpaid portions of purchase money or notes, or other evidences of indebtedness executed in part payment thereof.[98] Thus it was held in the case of Blin v. Schwartz that a person who has recovered his sanity may not sue to void a deed purported to have been executed while he was insane, and where he had already sued to recover the purchase price from the agent who had made the sale.[99] This election to contend for the purchase price would not be con-

[95] Dowlin v. Boyd (Tex. Com. App.) 291 S. W. 1096.

[96] Blinn v. Schwarz, 177 N. Y. 260, 69 N. E. 542, 101 Am. St. Rep. 806; Beasley v. Beasley, 180 Ill. 163, 54 N. E. 187.

[97] Beasley v. Beasley, 180 Ill. 163, 54 N. E. 187.

[98] Blinn v. Schwarz, 71 N. Y. S. 343, 63 App. Div. 25; Eaton v. Eaton, 37 N. J. Law, 108, 18 Am. Rep. 718; Tucker v. Moreland, 10 Pet. 58, 9 L. Ed. 345.

[99] Blinn v. Schwarz, 71 N. Y. S. 343, 63 App. Div. 25.

sistent with the idea of disaffirmance, as it would not be equitable for him to have the property and the price both.

§ 275. Affirmance by guardian, etc.

As a general rule, the guardian of an insane person may not affirm a deed or conveyance, except where it could have been made by him in the first instance, or where such affirmance is induced by additional consideration which makes it to the interest of the insane ward.[1] It is the better practice for such affirmance to be made under the affirmative direction of the court of the guardian's appointment and in accordance with statutory requirements.[2] Also, such affirmance by either the guardian, or by the ward after his recovery of sanity, may not be made where the rights of the others have intervened and such an affirmance would tend to affect the same. For example, it has been held that a recovered lunatic may not affirm a deed executed during the interval of his insanity, so as to affect or render invalid a prior deed executed while the grantor was sane, and which had been duly recorded.[3]

§ 276. Disaffirmance

As indicated supra, an insane person, on recovering his reason, may usually disaffirm conveyances made while he was insane, as conveyances made under such circumstances are ordinarily held to be voidable. As a general rule the right of disaffirmance exists, without reference to whether it was executed under inequitable circumstances, since the ground for avoiding a deed is the mental infirmity of the grantor, which prevents the giving assent

[1] Norton v. Norton, 5 Cush. (Mass.) 524; Griswold v. Butler, 3 Conn. 231; Valpey v. Rea, 130 Mass. 384; Molton v. Camroux, 2 Exch. 487.

[2] Rannells v. Gerner, 80 Mo. 474; Funk v. Rentchler, 134 Ind. 68, 33 N. E. 364, 898; Decennial and Other Key-Number Digests, Insane Persons, ⟸66; Fitzwilliams v. Davie, 18 Tex. Civ. App. 81, 43 S. W. 840.

[3] Bond v. Bond, 7 Allen (Mass.) 1.

to the act of conveyance.[4] But in several of the states it is held that the right of avoidance is not absolute, and the right to exercise it depends on whether there are any circumstances in the transaction which would render it inequitable.[5] Where it can be exercised, such affirmance must be by some affirmative act which clearly shows an intention on the part of the recovered lunatic to assert his right of reassuming dominion over the property, and must be made within such a time after his recovery as not to seriously prejudice the rights of other parties;[6] as, for example, it may be made by electing to sue for damages.[7]

§ 277. By whom made

As already indicated, an insane person who has recovered his reason may himself elect to void or disaffirm a deed executed by him while insane.[8] Whether any other person can act for him, he being in a rational state, is not clear; but the right would likely be personal so long as he was in a position to exercise it himself, if he so wished. Where such grantor has not recovered his reason, or immediately thereafter loses it again, it is well settled that others may act for him in making such election. It may be made by his personal representatives, such as a guardian or committee.[9] But it has been held that such an action for disaffirm-

[4] Smith v. Ryan, 191 N. Y. 452, 84 N. E. 401, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Gingrich v. Rogers, 69 Neb. 527, 96 N. W. 156; Mitchell v. Inman (Tex. Civ. App.) 156 S. W. 290; Brewster v. Weston, 235 Mass. 14, 126 N. E. 271.

[5] Green v. Hulse, 57 Colo. 238, 142 P. 416; Clay v. Clay's Committee, 179 Ky. 494, 200 S. W. 934; Rhoades v. Fuller, 139 Mo. 179, 40 S. W. 760; In re Owens, 90 N. J. Eq. 37, 105 A. 653.

[6] Ætna L. Ins. Co. v. Sellars, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; Ashmead v. Reynolds, 127 Ind. 441, 26 N. E. 80.

[7] Dowlin v. Boyd (Tex. Com. App.) 291 S. W. 1096.

[8] Kerwin v. Hibernia Ins. Co., 25 F. 692; Bensell v. Chancellor, 5 Whart. (Pa.) 371, 34 Am. Dec. 561.

[9] Warfield v. Fisk, 136 Mass. 219; Decennial and Other Key-Number Digests, Insane Persons, ⚖66, 67.

ance may not be brought by mere relatives during his lifetime, such as wife or children.[10] However, we would suggest that this is largely technical, and that such an action could likely be maintained by such relatives acting as next friend for the non compos under the general rule allowing the non compos to maintain action through another acting as next friend. It has been held that such an action to disaffirm cannot be brought through a next friend, but there is no logical reason for such a rule, and its effect will likely be confined to the jurisdiction where such decision was rendered.[11] It would seem that a subsequent purchaser would have a right to bring an action of disaffirmance as against a conveyance made while the grantor was insane.[12] This would be the logical rule at any rate, as the act on the part of the grantor of making the subsequent conveyance would indicate a repudiation on his part of the prior conveyance.

§ 278. By whom made after death of non compos

After the death of the non compos, conveyances made by him while in the state of derangement may be affirmed or set aside by his personal representatives and heirs,[13] with some restrictions. For instance, it is a disputed fact as to whether this right of disaffirmance will extend to his administrators. The weight of authority seems to hold that it will,[14] but there is authority

[10] Kilbee v. Myrick, 12 Fla. 419; Baldwin v. Golde, 88 Hun (N. Y.) 115, 34 N. Y. S. 587; Harman v. Harman, 90 W. Va. 303, 110 S. E. 718.

[11] Covington v. Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261, March 28, 1892.

[12] Clay v. Hammond, 199 Ill. 370, 65 N. E. 352, 93 Am. St. Rep. 146; Cates v. Woodson, 2 Dana (Ky.) 452; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71.

[13] Ingraham v. Baldwin, 9 N. Y. 54; Hunt v. Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Northwestern Mut. Fire Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185.

[14] Judge of Probate v. Stone, 44 N. H. 593; Fecel v. Guinault, 32 La. Ann. 91; Lazell v. Pinnick, 1 Tyler (Vt.) 247, 4 Am. Dec. 722; Miskey's Appeal, 107 Pa. 611.

for the contrary rule.[15] Again it is held that such right of disaffirmance is confined to heirs and "privies in blood," and cannot be exercised by a stranger[16] or a mere "privy in estate," [17] as, for example, a remainderman.[18] The reason would seem to be in the latter case that the remainderman could not set up the insanity of the owner of the life estate and so limit the remainder. But it has been held that one who purchased from a non compos after his restoration to sanity would not be "privy in estate" as here understood, but might disaffirm wherever his grantor could have done so.[19] A distinction might, of course, be drawn here, as the grantor would have already disaffirmed the former conveyance by his act of resuming control of the subject-matter in order to make the second conveyance.

§ 279. As affected by laches

A recovered lunatic, in disaffirming a conveyance made during the continuation of his insanity,[20] must act with reasonable promptness in doing so.[21] The reason is obvious. While the right to disaffirm may be necessary to protect the non compos it should be exercised with regard for the rights of other persons. Public policy requires that property rights be settled, and to allow a person who has recovered his sanity an indefinite time within which to avoid a deed or other conveyance made while he was insane would tend to unsettle property rights and work an unreasonable hardship on others. The same is true where the

[15] Campbell v. Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. Rep. 479.

[16] Hunt v. Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563; Dowlin v. Boyd (Tex. Com. App.) 291 S. W. 1096.

[17] Porter v. Brooks (Tex. Civ. App.) 159 S. W. 192; Key's Lessee v. Davis, 1 Md. 32; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh (Ky.) 236, 19 Am. Dec. 71.

[18] Key's Lessee v. Davis, 1 Md. 32; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71.

[19] Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Langley v. Langley, 45 Ark. 392.

[20] Ingraham v. Baldwin, 9 N. Y. 45.

[21] Norris v. Haggin, 136 U. S. 386, 10 S. Ct. 942, 34 L. Ed. 424.

heirs seek to disaffirm after his death. They may be stopped from doing so by acquiescence.[22]

§ 280. Reason for rule

Insanity will ordinarily excuse laches on the part of the insane, if it occurs during his actual insanity.[23] The doctrine of laches finds its inception in the courts of equity as analogous to the statute of limitation in the courts of law, and is founded on the idea of negligence on the part of the party to whom it is imputed. This negligence occurs in not promptly pursuing his remedy, by which delay possible injuries may occur to others who have innocently acquired equities in the property in question while the negligent party has "slept on his rights." Manifestly, then, such want of diligence cannot be imputed to one who has not mind sufficient to recognize his rights in the matter, or to appreciate the necessity of putting the laws into operation to secure them, but on recovering his reason such a person must act within a reasonable time after the facts have come to his knowledge, or he is charged with a knowledge, and the doctrine of laches will apply.[24] In some cases, mere mental weakness not amounting to actual insanity has been held to excuse delay and preclude the doctrine of laches, where the rights of others have not intervened.[25] But this would seem to be controlled very largely by the equities of the particular case.

§ 281. As affected by laches of others

But, as a general rule, the non compos is not chargeable with the laches of others, since he has no control over them. For example, it is held that a non compos is not chargeable with the laches of a "next friend" acting in his behalf. There is the additional reason here, of course, that such a person is a mere

[22] Green v. Hulse, 57 Colo. 238, 142 P. 416.

[23] Trowbridge v. Stone's Adm'r, 42 W. Va. 454, 26 S. E. 363; Heyl v. Goelz, 97 Wis. 327, 72 N. W. 626; 21 C. J. 241.

[24] Norris v. Haggin, 136 U. S. 386, 10 S. Ct. 942, 34 L. Ed. 424.

[25] Lundy v. Seymour, 55 N. J. Eq. 1, 35 A. 893.

volunteer, which the courts recognize only as it will be to the benefit of the non compos; he not being legally chargeable with the protection of the rights of the non compos.[26] Whether laches can be imputed to the legally appointed guardian or committee of an insane person is as yet an unsettled question;[27] but the tendency seems to be towards holding the non compos charged with such laches, the idea being that, as the guardian is legally charged with the care of the non compos, his failure to act must be taken as the failure of the ward. But in such case the courts would likely hold that the ward had recourse on the guardian for his negligent failure to act in season.

§ 282. Effect of limitations

Limitation is the creature of statute, and it seems to be the general rule that insanity will not affect the running of the statute of limitation against an insane person, unless the statute itself accepts such a one from the effect of its terms.[28] These statutes, exempting the non compos from the effect of the statute of limitation, vary in the different jurisdictions, but the courts seem to be inclined to give them liberal interpretations, for example, statutes exempting persons "under legal disability" are held to include insane persons.[29] However, it is held that such statutory exceptions refer to insanity existing at the time the cause of action occurs, and that the running will not be halted by subsequent mental disability.[30] Where the limitation is fixed by con-

[26] Heyl v. Goelz, 97 Wis. 327, 72 N. W. 626; Kidder v. Houston (N. J. Ch.) 47 A. 336.

[27] Knight v. Watts' Adm'rs, 26 W. Va. 175.

[28] Collier v. Smaltz, 149 Iowa, 230, 128 N. W. 396, Ann. Cas. 1912C, 1007; Alvarado v. Southern Pac. Co. (Tex. Civ. App.) 193 S. W. 1108; Touhey v. City of Decatur, 175 Ind. 98, 93 N. E. 540, 32 L. R. A. (N. S.) 350.

[29] Makepeace v. Bronnenberg, 146 Ind. 243, 45 N. E. 336; Liberty Oil Co. v. Condon Nat. Bank, 291 F. 293; Gillmore v. Gillmore, 91 Kan. 707, 709, 139 P. 386, 51 L. R. A. (N. S.) 834.

[30] Amole's Adm'rs Appeal, 115 Pa. 356, 8 A. 614; Becton v. Alexander, 27 Tex. 659; De Arnaud v. U. S., 151 U. S. 483, 14 S. Ct. 374.

tract, the courts are inclined to construe them liberally in favor of an insane party,[31] except where the insanity occurs within a fraction of a day, as where the insanity results from the actionable injury out of which the cause of action arises.[32] Persons merely weak-minded, and not coming within the definition of an insane person, are not protected by the statutory exception,[33] but persons deaf and dumb from their birth are classed as non compos in this respect.[34]

§ 283. Bona fide holder

There is much conflict in the decisions of the different states as to just how far the rights of innocent purchasers will be protected as against the right of the non compos to disaffirm sales made by him during his insanity. Generally speaking, the decisions fall into two groups, the first group affirming and the second group denying the right to disaffirm, where the rights of innocent purchasers have intervened. In support of the rule under the first group, it is contended that, if innocent holders of property are to be deprived of their title therein because of conditions of which they are wholly ignorant and for whose existence they were in no way to blame, it would greatly unsettle property rights, and for that reason public policy would forbid it. It is further contended that it would be very unjust to allow the non compos to enjoy the consideration he has secured upon the conveyance of property and then recover back the property itself. It is accordingly held by the decisons supporting this rule that,

38 L. Ed. 244; Meyer v. Christopher, 176 Mo. 580, 75 S. W. 750; Clark v. Richards, 15 N. J. Law, 347; Dugan v. Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306; Becton v. Alexander, 27 Tex. 659; Bensell v. Chancellor, 5 Whart. (Pa.) 371, 34 Am. Dec. 561.

[31] Metropolitan Casualty Ins. Co. of New York v. Johnson, 247 F. 65, 159 C. C. A. 283, 7 A. L. R. 175.

[32] Nebola v. Minnesota Iron Co., 102 Minn. 89, 112 N. W. 880, 12 Ann. Cas. 56; Sasser v. Davis, 27 Tex. 656.

[33] Piper v. Hoard, 107 N. Y. 67, 13 N. E. 632, 1 Am. St. Rep. 785.

[34] Oliver v. Berry, 53 Me. 206, 87 Am. Dec. 547.

where such purchaser has taken in good faith and without notice, has paid the substantial value of the property so purchased, and cannot be put back into status quo, his title to the property will not be interfered with because of the insanity of the grantor.[35] Under this rule, the consideration must be returned to the purchaser, or the purchaser put back into status quo before a rescission will be allowed on the part of the non compos or his representatives.[36] The non compos is not without remedy in such cases. Where the property has passed into the hands of an innocent purchaser, so that it is lost to the grantor, the original grantee under the sale from the non compos may be made to respond in damages, where he took with knowledge of the grantor's incompetency, or where his conduct in the premises amounted to fraud.[37] But the courts have refused to extend the rule so as to cover mortgagees, holding they do not occupy the position of innocent purchasers.[38]

[35] Kentland Coal & Coke Co. v. Keen, 168 Ky. 836, 183 S. W. 247, L. R. A. 1916D, 924; Coburn v. Raymond, 76 Conn. 489, 57 A. 117, 100 Am. St. Rep. 1000; Robinson v. Kind, 25 Nev. 292, 62 P. 705; Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686; Rhoades v. Fuller, 139 Mo. 179, 40 S. W. 760; Matthiessen & Weichers Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 546; Jamison v. Culligan, 151 Mo. 410, 52 S. W. 224; Perry, Trusts (4th Ed.) 35; Decennial and Other Key-Number Digests, Insane Persons, ⇐61; Burch v. Nicholson, 157 Iowa, 502, 137 N. W. 1066; Lancaster County Nat. Bank v. Moore, 78 Pa. 407, 21 Am. Rep. 24.

[36] Eaton v. Eaton, 37 N. J. Law, 108, 18 Am. Rep. 717; Lincoln v. Buckmaster, 32 Vt. 652; More v. Calkins, 85 Cal. 177, 24 P. 729; Rusk v. Fenton, 14 Bush (Ky.) 490; 29 Am. Rep. 413; Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; Arnold v. Richmond Iron Works, 1 Gray (Mass.) 434; Jamison v. Culligan, 151 Mo. 410, 52 S. W. 224.

[37] Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 181.

[38] Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512.

§ 284. Burden of showing good faith

But, after the incompetency has been shown, the burden is upon the purchaser to show that he took in good faith, without notice, and for an inadequate consideration.[39] The reason for the rule is well stated in Hosler v. Beard,[40] viz.: Such a plea of insanity on the part of the grantor, an absence of reason at the time of the transaction having been shown, is a bar to any further action. The general rule is that insanity will avoid the sale, and the instances where this will not apply, as, for example, that the property had passed into the hands of an innocent purchaser, are exceptions. Presumption always favors the general and usual rule, and any exception to such rule changing the effect thereof must be established by the party setting it up and seeking to take advantage of it. Hence, when the plea of insanity is sought to be avoided by the plea of the innocent purchaser in good faith and for an adequate consideration, it must be pleaded and proven by the party to those benefit it operates.

§ 285. Contrary rule

As suggested supra, the rule we have discussed above[41] is opposed by decisions in a number of states, who base their decisions on the absence of mental capacity in the grantor, which renders his attempted conveyance without force, and, therefore, subject to being avoided; and, in answer to the arguments advanced in favor of allowing the plea of innocent purchaser, it is affirmed that such a rule as we have stated would be open to the greatest abuse, as it would allow persons who had secured property from incompetent persons to escape and reap the benefits of their wrong, by merely passing such property into the hands of

39 Hull v. Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; Maxwell, Code Pl. 449; Bailey, Onus Probandi, 144, 145.

40 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720.

41 See supra, § 283.

an innocent purchaser. It is further contended that the rights of the non compos are superior to those of the innocent purchaser; the idea seeming to be that such purchaser is much more able to look after his own interests than the non compos, and that, where one of two apparently equally innocent persons must suffer, the loss should fall on the one most able to protect himself, and therefore charged with the higher degree of care in the transaction. It is accordingly held in a number of states that the conveyance of an insane grantor may be rescinded and the property recovered back, regardless of whether the purchaser had notice of the grantor's incompetency, or of whether the consideration had or could be returned.[42] The same rule has been held to apply to a contract for the conveyance of property as there is no practical difference between a contract for the conveyance, and an actual conveyance, of land, as the effect in both cases is the same.[43]

§ 286. Compromise rule

In Texas and a few other states, still another rule has been laid down by the courts, which seems to be somewhat of a compromise between the two other rules, and has some of the features of both. Up to and including the decision in Williams v. Sapieha,[44] the courts of Texas seemed inclined to follow the first of the two rules we have discussed, but on the appeal of this case to the Supreme Court,[45] the decision therein was modified. While the rule as it is now laid down recognizes to some extent the rights of the innocent purchaser, it will not protect the rights

[42] Hull v. Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Bates v. Hyman (Miss.) 28 So. 567; Flanders v. Davis, 19 N. H. 139; Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 245, 19 Am. Dec. 71; American Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167.

[43] Reinicker v. Smith, 2 Har. & J. (Md.) 421.

[44] (Tex. Civ. App.) 59 S. W. 947.

[45] Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115.

of such innocent purchaser, when they come into conflict with those of the non compos. It is therefore held that such a conveyance may be avoided by the non compos or his representatives, without reference to the prior knowledge and good faith of the purchaser, but that, where the purchaser took without notice of the grantor's incompetency and for an adequate consideration, the consideration, or such portion thereof as remains in the hands of the grantor, or is shown to have been expended by him for necessities, must be returned to the purchaser.[46] The burden to show this is upon the purchaser, and where it does not affirmatively appear that any portion of the consideration remains in the grantor's hands, or has been expended by him for necessities, the property will be restored to the insane grantor without reference to the consideration.

§ 287. Incumbrance of real estate

Ordinarily the same rule may be said to apply to mortgages executed by an insane person which applies to conveyances executed by them during the period of their insanity. The mortgage or other incumbrance of property is, after all, for all practical purposes and as its effect goes, a conveyance of an interest in the property affected by it, and may lead to its final loss through a foreclosure of the lien so retained. Therefore mere mental weakness, great age and feebleness of body, or loss of memory will render such instrument voidable only where imposition amounting to actual or constructive fraud is shown;[47]

[46] Brown v. Brenner (Tex. Civ. App.) 161 S. W. 14; Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115; Donaldson v. Meyer (Tex. Com. App.) 261 S. W. 369.

[47] Stockmeyer v. Tobin, 139 U. S. 176, 11 S. Ct. 504, 35 L. Ed. 123; Hall's Adm'r v. Mutual Life Ins. Co. of Kentucky, 43 S. W. 194, 19 Ky. Law Rep. 1240; Farmers' Bank v. Normand, 3 Neb. (Unof.) 643, 92 N. W. 723; Merritt v. Merritt, 32 Misc. Rep. 21, 66 N. Y. S. 123; Holmes v. Martin, 123 Mich. 155, 81 N. W. 1072; Jacks v. Estee, 139 Cal. 507, 73 P. 247; Coleman v. Frazer, 3 Bush (Ky.) 300; Howell v. Griffiths (N. J. Ch.) 22 A. 928; Griffiths v. Howell, 48 N. J. Eq. 648, 25 A. 20; Boyer v. Berryman, 123 Ind. 452, 24 N. E. 249.

but where it is made to appear that the grantor, or mortgagor, was so mentally defective as to be unable to understand and appreciate the nature and consequences of his act in executing such lien upon his property, such incumbrance may be avoided or its enforcement resisted under the same circumstance as an actual conveyance by the non compos.[48] This is especially true where the non compos has been regularly adjudged insane, and this fact is known to the mortgagee.[49] The rule with the reference to the rights of innocent purchasers in the sale of realty by insane persons supra,[50] applies similarly to the mortgages and other liens placed by the non compos upon his lands,[51] and the general rule is followed with reference to the burden of proof, i. e., the lien will hold good till the maker's insanity is established by one seeking to have it set aside.[52] What might possibly be called exceptions are to be noted where the mortgage is given for necessities, and where it represents funds advanced to take up already existing indebtedness. Of course, the above will not apply to incumbrances placed on the land prior to the insanity of the person sought to be charged. This not only applies to liens arising out of contract as in case of mortgages, etc., but applies to these fixed by operation of the law. For example, it is held that the land of an insane person will be subject to a judgment lien priorly placed.[53]

[48] Brothers v. Bank of Kaukauna, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; Brigham v. Fayerweather, 144 Mass. 48, 10 N. E. 735; Boyd v. Mulvihill, 61 Neb. 878, 86 N. W. 922; Merritt v. Merritt, 32 Misc. Rep. 21, 66 N. Y. S. 123; Tautum v. Tautum's Adm'r, 101 Va. 77, 43 S. E. 184.

[49] New England Loan & Trust Co. v. Spitler, 54 Kan. 560, 38 P. 799.

[50] See supra, § 283 et seq.

[51] Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512.

[52] Youn v. Lamont, 56 Minn. 216, 57 N. W. 478; Hall's Adm'r v. Mutual Life Ins. Co. of Kentucky, 43 S. W. 194, 19 Ky. Law Rep. 1240; Baker v. Clark, 52 Mich. 22, 17 N. W. 225.

[53] French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910.

§ 288. For necessities

Since a contract of an insane person for necessities is enforceable, it seems to be held that a lien given by an insane person upon his property for the same purpose will be enforceable.[54] The reason for this apparent exception to the general rule is the same as that giving force to contracts, for necessities in the first place, i. e., the necessity of the case. If an insane person was not allowed to so contract, and even secure such contract by a lien upon his realty, he might fall into want with an abundance of property that he was wholly unable to use to supply his immediate needs. But a lien so given by an insane person upon his property is only good to the extent of the actual value of the necessities furnished. For example, it is held that a note, secured by mortgage on realty of an insane person, could only be collected to the extent of the reasonable value of the necessaries actually furnished the non compos, and where the necessities were not actually furnished, the note would be uncollectible.[55] It would also seem that the money represented by such lien, or services rendered in lieu thereof, must have been advanced or rendered for the express purpose of supplying the non compos with necessities. The fact that such money was advanced or such services were rendered to the non compos for another purpose, but actually went to his support, will not be sufficient, and a lien given or deed executed under such circumstances have been held void.[56]

54 Ferguson v. Fitze (Tex. Civ. App.) 173 S. W. 500; Wells v. Salina, 71 Hun, 559, 25 N. Y. S. 134; Coleman v. Frazer, 3 Bush (Ky.) 300; 3 Pom. Eq. Jur. § 1300; Decennial and Other Key-Number Digests, Insane Persons, ⟸77, 248.

55 Ferguson v. Fitze (Tex. Civ. App.) 173 S. W. 500; Cutter v. Burroughs, 100 Me. 379, 61 A. 767.

56 German Sav. & Loan Soc. v. De Lashmutt, 67 F. 399.

§ 289. For extensions of existing indebtedness

A lien given by an insane person to secure money advanced in good faith to pay off an existing indebtedness will ordinarily be held to be enforceable against the estate of the non compos.[57] In such cases it is considered in the nature of a renewal of the existing indebtedness. But such mortgage will only be protected to the extent of the rights of the original creditor to whose rights he is subrogated. For example, it is held that where the former mortgage, taken up by the money advanced under the mortgage in question, was itself void, and the money was actually used to pay the unsecured debt of the insane mortgagor, a recovery will be denied.[58]

§ 290. Deed of trust

It is held that the power of sale given in a deed of trust is not revoked or abated by the subsequent insanity of the grantor.[59] The idea seems to be that the functions of a trustee is merely ministrative in its nature, and the obligation having been created prior to the insanity of the grantor, the execution of the trust already created would not be affected by the subsequent insanity. In this it is distinguished from a power of attorney.

§ 291. Release by non compos

As a necessary corollary to the rule that forbids an insane person to convey or incumber property, it is held that such insane person, who is too mentally defective to understand and appreciate the nature and result of his act, cannot be held on a release executed by him; and that such a release executed by him is voidable,[60] and his attempt to so bind himself is not aided by

[57] Cutter v. Burroughs, 100 Me. 379, 61 A. 767; Edwards v. Davenport, 20 F. 756.

[58] Corbin v. Dwyer, 30 Misc. Rep. 488, 63 N. Y. S. 822.

[59] Haggart v. Ranger, 15 F. 861, 4 Woods, 403.

[60] 34 Cyc. 1054.

the unauthorized act of the guardian or committee in affirming the same.[61]

§ 292. Power of attorney by non compos

As in the case with reference to many other questions relating to the laws governing insanity, there seems to be much conflict as to force to be given a power of attorney executed by an insane person, especially where it relates to the sale of real estate. As a result of the divergence of opinion on this, two distinct rules seem to have been evolved. In some jurisdictions, and especially in the more recent decisions, the courts seem to be inclined to drift to a middle ground between the two and to effect a rule that would be something of a compromise.

§ 293. Rule in federal and English courts

In the courts of England, in the courts of the United States, and in the courts of a number of the states, it has been held that a power of attorney given by an insane person, especially where it purports to authorize the sale of land, is void, inasmuch as such a one can hardly transfer to an agent powers he does not himself possess. These decisions place the power of attorney of an insane person on the same basis as that of an infant, holding that both alike are void, and that they will not be given the same effect as a deed in that they do not take effect by delivery.[62] These decisions would seem to given no effect whatever to a power of attorney executed under such circumstances.

[61] Funk v. Rentchler, 134 Ind. 68, 33 N. E. 364.

[62] Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73; Philpot v. Bingham, 55 Ala. 435; Armitage v. Widoe, 36 Mich. 124; Fetrow v. Wiseman, 40 Ind. 148; Lawrence's Lessee v. McArter, 10 Ohio, 37; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; Pyle v. Cravens, 4 Litt. (Ky.) 17.

§ 294. Rule in Texas and other states

The rule that holds a power of attorney executed under an insane person to be void is denied in Texas and by the courts of some other states. These courts reason that, since a non compos not under guardianship can pass title by deed, subject only to his future disaffirmance, such a one could pass title by a regularly executed power of attorney, and that, therefore, such an instrument is voidable only,[63] and will remain in effect till disaffirmed. This line of decisions seem to hold that there is no practical difference between a conveyance direct by deed and a conveyance by a power of attorney.

§ 295. General rule

We think the true rule, as being evolved by the later decisions, lies between the two rules we have discussed above. In spite of the attempt to distinguish them by the fact that one is affected by a delivery direct by hand, and the other by the medium of an agent, from a practical standpoint there is little difference between the effect of a deed and a power of attorney, as is very clearly pointed out by the Supreme Court of Texas in the case of Williams v. Sapieha.[64] The purpose and end of both alike is to convey property out of the non compos. We therefore see no reason why the same rule should not apply to a power of attorney as is applied in the case of deeds; i. e., where the deed of an insane person who is under guardianship or of one who has been adjudged insane would be void, a power of attorney executed under similar circumstances would be void; but where such one is not under guardianship, and has not been adjudged insane, his power of attorney, and any deed executed by his at-

[63] Williams v. Sapieha (Tex. Civ. App.) 59 S. W. 948, Id., 94 Tex. 433, 61 S. W. 116; Blinn v. Schwarz, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806; Allen v. Berryhill, 27 Iowa, 534, 1 Am. Rep. 309.

[64] Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115.

torney in fact thereunder, would be voidable only.[65] While this rule is not supported by all the authorities, as pointed out supra, we think the decided tendency of the later decisions is towards it.

§ 296. Rights of innocent purchaser

Just what will be the effect where the sale under a power of attorney has passed the property into the hands of an innocent purchaser is not clear. While the authorities are in conflict as to how far the non compos can go in disaffirming such a conveyance, without restoring the consideration or otherwise placing the purchaser in statu quo, we think the rule which applies to conveyances made direct by the non compos, and fully discussed supra,[66] will hold good here; i. e., where the non compos has been declared insane and placed under guardianship, his power of attorney, and any deed executed by virtue thereof, will be void, and may be disregarded with reference to the rights of third parties, but that, where such non compos has not been declared insane and placed under guardianship, his power of attorney and deeds made thereunder will be voidable only, and cannot be disaffirmed unless the consideration is returned to the purchaser or he is placed in statu quo. This might apply in only a limited sense to Texas and other jurisdictions, where it is held that only that part of the consideration need be returned as is still retained by the non compos or has been expended for necessities.[67]

§ 297. Execution during lucid interval

As we have noted, a person ordinarily insane may act in a rational manner during a lucid interval. It therefore follows that a deed executed during a lucid interval will be binding and enforceable, provided the non compos had sufficiently recovered his reason to act intelligently. However, where the incompetency has once been shown, it devolves upon the person seeking

65 Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115.
66 See supra, § 283.
67 See § 286.

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to establish the deed to show that it was executed during a lucid interval.[68]

§ 298. Burden of proof

As will be seen more fully under the head of Evidence, the burden of proof in an action to set aside a conveyance of property on the ground of the alleged insanity of the person executing it will follow the general rule in actions; i. e., the burden of proof is upon the person seeking to set aside the conveyance in question, inasmuch as every person is presumed to be sane, and transactions regular and fair on their face are presumed to be regular and binding, until the contrary is shown by competent evidence.[69] This burden of proof is met by showing the party executing the conveyance to be insane; and it will then devolve upon the opposite party to show that it was executed while such person was competent.[70]

§ 299. Conveyance by intoxicated person

Where a conveyance is executed by a person so intoxicated that he is unable to understand and appreciate what he is doing,[71] much the same rule governs as applies to the execution of a conveyance by an insane grantor; i. e., such conveyance may be avoided by him upon his becoming sober.[72] But such conveyances cannot be attacked collaterally or questioned by any one except the grantor, and, perhaps, the probate court having charge of an habitual drunkard. There must have been a subversion of the mind; and the mere fact of the intoxication of the grantor will not be sufficient, in the absence of evidence that the intoxication was brought about by the grantee, or that some unfair ad-

[68] Gingrich v. Rogers, 69 Neb. 527, 96 N. W. 156.

[69] See ante, § 526 et seq.

[70] Ante, § 528.

[71] Martin v. Harsh, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000; Burch v. Scott, 168 N. C. 602, 84 S. E. 1035.

[72] Crane v. Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519; Wright v. Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; Loftis v. Marshall, 134 Cal. 394, 66 P. 571, 86 Am. St. Rep. 286.

vantage was taken by him.[73] Where the intoxicated grantor is under guardianship, it is held that any attempted conveyance by him is void.[74]

§ 300. Expectancy—Effect of insanity on

There is some conflict in the authorities as to how far the insanity of the holder of the present estate in a freehold will affect the right of an heir apparent to dispose of his expectancy therein. However, the weight of authority would seem to hold that, as the assent of the present holder of an inheritance is not essential in order to enable another to dispose of an estate in expectancy he may have therein, the insanity of the present holder of the property will be immaterial.[75] This would seem to be the logical rule.

§ 301. Right to chose in action, in general

As a general rule, the insanity of a person in no way affects his right to a chose in action. This applies with equal force, whether the right of action arose in him before or after his becoming insane. In this connection the general rule governing the right of an insane person to take and hold property is followed, and, while the manner of asserting the right may be somewhat restricted, the right itself remains practically unaffected by the derangement.[76]

§ 302. Right to sue on, in general

While there has never been any serious contention that an insane person may not acquire the right of property in a chose in action, which does not tend to charge him or his estate with a

[73] 18 C. J. 223.

[74] Cockrill v. Cockrill, 92 F. 811, 34 C. C. A. 254; Pinkston v. Semple, 92 Ala. 564, 9 So. 329.

[75] Hale v. Hollon, 90 Tex. 427, 39 S. W. 287, 36 L. R. A. 75, 59 Am. St. Rep. 819.

[76] See Decennial and Other Key-Number Digests, Insane Persons, ⊂59; 14 R. C. L. 611.

burden, there has been some serious question of his right to reduce such chose in action to possession; i. e., to bring suit on his right of action. Indeed, the early authorities specifically denied to the lunatic and idiot, as such, the right to enter the courts for the purpose of bringing suit and enforcing such rights of action, inasmuch as it was thought they did not have mind to intelligently understand what they were doing.[77] The idea seemed to be that entering upon litigation was such a serious step that persons mentally irresponsible should not be allowed to take it, especially as they could not weigh their chances of recovery, and to allow the right would likely open the door to vexing and useless litigation initiated by irresponsible persons. This rule was sometimes carried to extreme lengths.[78]

§ 303. American rule

This is not the rule in the American states; and, indeed, is said never to have secured a foothold in this country.[79] The rule in Texas and the other American states permits the non compos to bring suit in any of the courts, where necessary to protect his interests or to reduce to possession a chose in action he may have, and only places upon him certain restrictions in the manner of bringing the suit, which are considered necessary for his protection.[80]

§ 304. Old common-law rule

Coexistent with the right to hold property is the right to enter the courts of the country to protect such rights in property. The courts have of necessity recognized this in time. When the rule was first given recognition by the court, many restrictions were imposed. It was held by the English courts that suit could only

[77] Co. Litt. 135b.

[78] Beverley's Case, 4 Coke, 124.

[79] Holzheiser v. Gulf, W. T. & P. Ry. Co., 11 Tex. Civ. App. 677, 33 S. W. 887.

[80] Decennial and Other Key-Number Digests, Insane Persons, ⟸ 87; 14 R. C. L. 611.

be brought by the guardian, first, because the non compos could not be allowed to *stultify* himself; and, second, because the guardian was at that time held to have an interest in the property of the estate.[81] This rule found some slight recognition in the early decisions of this country;[82] but it seems now to be well settled that such actions may be brought by the non compos in his own name where such action is necessary to protect his property rights, unless the contrary is expressly provided by statute.[83]

§ 305. Exceptions to rule

An apparent exception to the rule that an insane person, not under guardianship, may sue as a normal person, is found in the case of certain statutory proceedings that must be initiated by complaint made under oath of the complaining person; as for example, where statutes provide that a proceeding in bastardy can only be instituted by the complaining witness under oath, and by no one else. Where the complaining witness in such case is non compos, and for that reason wholly unable to make the required affidavit, it would seem that the proceeding cannot be instituted.[84]

§ 306. Capacity to file criminal complaint

Since the insane person is incapable of making affidavit, as we have seen, for the reason that such disability would necessarily follow as a corollary to his disqualification as a witness, it has been held that he may not make complaint as a basis for criminal prosecution. One who is without reason and discretion could not be allowed to judge the expediency of initiating so impor-

[81] 1 Dan. Ch. Prac. 9, 35; 1 Story, Eq. Jur. (9th Ed.) § 225; Ortley v. Messere, 7 Johns. Ch. (N. Y.) 139.

[82] Bradley v. Amidon, 10 Paige (N. Y.) 235; McKillip v. McKillip, 8 Barb. (N. Y.) 552; Person v. Warren, 14 Barb. (N. Y.) 488.

[83] Wiesmann v. Donald, 125 Wis. 600, 104 N. W. 916, 2 L. R. A. (N. S.) 961; 1 Dan. Ch. Prac. 11; Decennial and Other Key-Number Digests, Insane Persons, ⟸87.

[84] State v. Jehlik, 66 Kan. 301, 71 P. 572, 61 L. R. A. 265.

tant a matter as criminal prosecution, that might taint another with infamy. It is therefore held that the complaint, and all proceedings held thereof, would be void. As said by Chief Justice Johnson of the Kansas court, in the case of State ex rel. Yilek v. Jehlik:[85] "Having no mind and understanding, there was in fact no complaint. The arrest and prosecution of an insane person on the initiative of one mentally irresponsible is beyond reason; and since the incapacity of the complainant is conceded * * * the proceeding was null and void."

§ 307. Proceedings—How instituted

As we have noted supra, the non compos was early allowed to go into the courts of both law and equity in order to protect his property rights; but this was only on condition that he appear through some normal person, who was capable of intelligently looking after his interests and of entering a proper appearance before the court; while the courts finally abandoned, as we have seen, the rule of having the actions brought in the guardian's name, yet as a matter of practical caution, and of public policy, they require it to be instituted through the agency of a normal mind. Where there was a regularly appointed guardian of the estate of such non compos, there was little chance of confusion, as such guardian may usually bring the suit as a part of his duties.[86] Even where the non compos was in court as a defendant, and his incompetency brought to the court's attention, he at once becomes, in a sense, a ward of the court, and a special guardian could be appointed under the direction of the court to look after his interests.[87] But where a non compos was without guardi-

[85] State v. Jehlik, 66 Kan. 301, 71 P. 572, 61 L. R. A. 265.

[86] Chavannes v. Priestley, 80 Iowa, 316, 45 N. W. 766, 9 L. R. A. 193; Decennial and Other Key-Number Digests, Insane Persons, ⇐93; Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 61 Am. St. Rep. 665, 40 L. R. A. 737.

[87] Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230; Wiesman v. Donald, 125 Wis. 600, 104 N. W. 916, 2 L. R. A. (N. S.) 961.

an, and it became necessary for him to appeal to the courts for redress, a very difficult question arose. Until an action was actually brought, the court had no jurisdiction that would enable it to appoint a special guardian for a *contemplated* suit, and the office of the probate or chancery courts in granting a regular guardianship might be too slow for the prompt protection of the rights of the non compos, or at least needlessly expensive.

§ 308. By next friend

To meet the necessity of the case, the equity courts evolved the rule of allowing first to idiots, and later to all classes of mental incompetents, the right to initiate legal proceedings through any intelligent and responsible person.[88] As this was usually a member of the insane person's family, or a close acquaintance who had volunteered his services, he became known as the "next friend" of the insane person. Such person took upon himself the responsibility of appearing in behalf of the non compos without further authority than the demands of the occasion, and his assumed office might be repudiated by the non compos, or the next friend might be called upon to justify his action by the court he had elected to enter.[89] It has therefore now become the well-established law in the American states that any person non compos mentis, who is not under guardianship, may begin an action either in law or equity by another as next friend, acting in good faith.[90] This applied to almost all forms of action, including

88 Wager v. Wagoner, 53 Neb. 511, 73 N. W. 937; Isle v. Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513; Penington v. Thompson, 5 Del. Ch. 328; Edwards v. Edwards, 14 Tex. Civ. App. 87, 36 S. W. 1080; Collins v. Toppin, 63 N. J. Eq. 381, 51 A. 933; Decennial and Other Key-Number Digests, Insane Persons, ⟸94.

89 Covington v. Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261; Dorsheimer v. Roorback, 18 N. J. Eq. 438; 14 R. C. L. 612.

90 Buswell on Insanity, § 120; Decennial and Other Key-Number Digests, Insane Persons, ⟸94; 32 C. J. 589; Isle v. Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513.

those involving title to land.[91] In several of the states the right to so bring an action by another as next friend is expressly given by statute.[92] Some slight restriction has been placed by some courts, requiring such persons to first apply to the court he is about to enter as a volunteer guardian, for its sanction of his bringing such proceedings,[93] but this requirement is confined to local courts.

§ 309. Where the non compos is under guardianship

After due inquiry has been had into a litigant's sanity in a court of competent jurisdiction, and his status as a non compos has been fixed, the necessity, and with it the right, to be represented by a volunteer as next friend, ceases as a general rule.[94] Except under certain exceptional circumstances, which will be noted hereafter, such non compos should be represented in any necessary litigation by the regular guardian appointed in connection with such lunacy proceedings.[95]

§ 310. Exceptions to rule

Where from any reason the non compos cannot be properly represented by a regularly appointed guardian, the necessity for the intervention of a volunteer as next friend will revive, notwithstanding the lunacy proceedings. A number of such instances have been recognized by the court as follows:

[91] Stephens v. Porter, 11 Heisk. (Tenn.) 341; Porter v. Porter, L. R. 37, Ch. Div. 420, 58 L. T. (N. S.) 688, 36 Week. Rep. 580.

[92] Rev. St. Tex. 1925, art. 1994; Gantt's Dig. Ark. art. 4486; Civ. Code Prac. Ky. § 35, subd. 3.

[93] Palmer v. Sinnickson, 59 N. J. Eq. 530, 46 A. 517.

[94] Chavannes v. Priestley, 80 Iowa, 316, 45 N. W. 766, 9 L. R. A. 193; Lombard v. Morse, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273; Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665; Covington v. Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261; Upton's Committee v. Bush, 135 Ky. 102, 121 S. W. 1005.

[95] Decennial and Other Key-Number Digests, Insane Persons, ⚖ 94; 32 C. J. 771; Isle v. Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513. See 64 L. R. A. 526.

(1) Where such plaintiff has been duly adjudged insane, but no guardian has actually been appointed.[96] In such a case, so far as having a duly appointed guardian is concerned, the non compos stands as if the inquiry had not been heard, and the necessity for a volunteer representative arises to the same extent as before the inquiry was made.

(2) Where such plaintiff has been duly adjudged insane, and a guardian duly appointed, but there is no guardian available at the time or place that the necessity for representation arises, or his appointment as guardian is invalid.[97]

(3) Where the guardian has been removed subsequent to the adjudication and appointment.[98] Of course, where this has occurred, the condition for all practical purposes is as if no guardian had been appointed.

(4) Where the guardian is unable or unwilling to act in the matter in question. This may occur in various instances, for example:

(a) Where the guardian is a nonresident of the state or country where the necessity for suit arises.[99] In this case the guardian is so far removed from the forum where the litigation arises that he is not available as a representative for the non compos' interests.

(b) Where the regularly appointed guardian neglects or refuses to act.[1] But it must be shown in unmistakable terms that this is the case before a mere volunteer will be allowed to inter-

[96] Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383; Williams v. Gaither, 139 Tenn. 587, 202 S. W. 917; Houseman v. Home Ins. Co., 78 W. Va. 203, 88 S. E. 1048, L. R. A. 1917A, 299.

[97] Upton's Committee v. Bush, 135 Ky. 102, 121 S. W. 1005.

[98] Bird's Committee v. Bird, 21 Grat. (Va.) 712; Cook v. Thornhill, 13 Tex. 293, 65 Am. Dec. 63; Pelham v. Moore, 21 Tex. 756; Speck v. Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213.

[99] Houseman v. Home Ins. Co., 78 W. Va. 203, 88 S. E. 1048, L. R. A. 1917A, 299.

[1] Houseman v. Home Ins. Co., 78 W. Va. 203, 88 S. E. 1048, L. R. A. 1917A, 299; Taylor v. Lovering, 171 Mass. 303, 50 N. E. 612.

fere with the control of the guardian over the matters so intrusted to him. The cases, indeed, tend to hold that the proper procedure in such case would be to remove the guardian and appoint another who will act.[2] We suggest that the objection to such a procedure would be that it would call for the same delay, etc., as necessitates the office of next friend in the first instance, before the appointment of a guardian, as the same delay would be imperative till the new guardian should be appointed. The true rule would be probably that a next friend would be allowed to initiate the necessary legal proceeding, and to continue to act till the existing guardian had been removed and another appointed in his place.

(5) Another condition, necessitating or excusing the intervention of a next friend, is where bad faith is shown on the part of the existing guardian, or where the interests of such guardian are so adverse to those of the ward as to prejudice the ward's interest.[3] In such case the regular guardian is worse than none at all in respect to matters requiring attention, and a next friend may appear for the non compos,[4] unless otherwise provided by statute.[5]

(6) Finally, notwithstanding the existence of a regularly ap-

[2] Rankert v. Rankert, 105 App. Div. 37, 93 N. Y. S. 399; Row v. Row, 53 Ohio St. 249, 41 N. E. 239.

[3] Gray v. Parke, 155 Mass. 433, 29 N. E. 641; Mackey v. Peters, 22 App. D. C. 341; Barron v. City of Lexington, 105 S. W. 395, 32 Ky. Law Rep. 92; Howard v. Landsberg's Committee, 108 Va. 161, 60 S. E. 769; Norcom v. Rogers, 16 N. J. Eq. 484; Marx v. Rowlands, 59 Wis. 110, 17 N. W. 687.

[4] 27 Cent. Dig. tit. Insane Persons, § 164; Isle v. Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513; Cates v. Woodson, 2 Dana (Ky.) 452; Hewitt's Case, 3 Bland (Md.) 184; Norcom v. Rogers, 16 N. J. Eq. 484; Hinton v. Bland's Adm'r, 81 Va. 588; Rankert v. Rankert, 105 App. Div. 37, 93 N. Y. S. 399; Marx v. Rowlands, 59 Wis. 110, 17 N. W. 687; Bonner v. Evans, 89 Ga. 656, 15 S. E. 906; Bird's Committee v. Bird, 21 Grat. (Va.) 712; Wood v. Throckmorton, 26 Colo. 248, 57 P. 699.

[5] Tiffany v. Worthington, 96 Iowa, 560, 65 N. W. 817.

pointed guardian, a next friend may appear when authorized by express statutory provision.[6]

§ 311. Guardian ad litem

As we have seen, the volunteer "next friend" is a creature of necessity, the need for his services usually arising before the incompetent has begun legal proceedings, and consequent without the jurisdiction of the court which he is seeking to enter. Where the need for a representative becomes apparent, where the person non compos mentis is already in court, it is usual for such court to appoint a special guardian to conduct the litigation on behalf of the non compos. Such a guardian is usually known as a guardian ad litem; and, in the absence of disqualification of the regular guardian, he may be appointed under much the same condition and with much the same powers and duties as those exercised by the next friend.[7]

§ 312. Appointment

The power in a court to appoint a guardian ad litem holds good, even where the non compos party to the suit has not been adjudged insane,[8] and is a matter resting very largely within the sound discretion of the court. The right to appear for another as next friend is not a matter of right, but is a matter of privilege, and the court he is seeking to enter in that capacity may inquire into the propriety of allowing him to so act, and may either

[6] Covington v. Neftzger, 140 Ill. 608, 30 N. E. 764, 33 Am. St. Rep. 261; Justice v. Ott, 87 Cal. 530, 25 P. 691; Plympton v. Hall, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675; Hicks v. Hicks, 79 Wis. 465, 48 N. W. 495.

[7] Ex parte Roundtree, 51 S. C. 405, 29 S. E. 66; Markle v. Markle, 4 Johns. Ch. (N. Y.) 168; Plympton v. Hall, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675; Texas & P. R. Co. v. Bailey, 73 Tex. 19, 18 S. W. 481; Bensieck v. Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422. See Security Loan & Trust Co. v. Kauffman, 108 Cal. 214, 41 P. 467; 64 L. R. A. 516; Century Digest, Insane Persons, § 164.

[8] Wager v. Wagoner, 53 Neb. 513, 73 N. W. 937; Isle v. Cranby, 199 Ill. 40, 64 N. E. 1065, 64 L. R. A. 520.

dismiss the action or may substitute a guardian ad litem of its own choosing for such next friend, where it decides that such action would be for the best interests of the non compos.[9] The power to so appoint a guardian ad litem has been held to apply to nonresident[10] as well as resident persons non compos mentis, though there is some dissent as to the last proposition, where the court has not actual jurisdiction over the person of such insane person.[11] The judgment of one state as to the right of an insane person to appear in a suit by a next friend will be conclusive in courts of another state.[12]

§ 313. Action by legal guardian

As indicated supra, in section 309, in cases where the plaintiff in an action has been adjudged insane and a guardian appointed for him, as a general rule he may not bring an action either in his own name or through a next friend. In such a case the necessity for allowing this no longer exists, and his new status as a non compos will intervene. It would seem that after such adjudication the volition of the guardian is substituted for that of the ward, inasmuch as the ward has to a large extent lost his identity as an individual, or at least his right to act as such. This arises out of the peculiar necessity of the case, and the end of the guardian's appointment would be defeated, if the ward was allowed to continue to act independently of him. As illustrating this, we find that after the appointment of a guardian, no one, not even a member of the non compos' immediate family, for example, his wife, can bring an action in his behalf,[13]

[9] Story, Eq. Jur. §§ 1362, 1363; Story, Eq. Pl. (10th Ed.) § 60; Sale v. Sale, Beav. 586; King's Case, 161 Mass. 46, 36 N. E. 685; King v. McLean Asylum of the Massachusetts General Hospital, 64 F. 331, 12 C. C. A. 145, 21 U. S. App. 481, 26 L. R. A. 784.

[10] Sturges v. Longworth, 1 Ohio St. 544; Hansell v. Hansell, 44 La. Ann. 548, 10 So. 941.

[11] Plympton v. Hall, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675.

[12] Cook v. Thornhill, 13 Tex. 293, 65 Am. Dec. 63.

[13] Texas & P. R. Co. v. Bailey, 83 Tex. 19, 18 S. W. 481; Kilbee v. Myrick, 12 Fla. 419; Byrnes v. Byrnes' Minors, 111 La. 403, 35 So. 617.

and, a fortiori, such an action cannot be brought by the heirs of such non compos, for the reason that he is still a living person and for that reason cannot have heirs.[14] Therefore, where a person has been adjudged insane and a guardian appointed, any action on behalf of the non compos should be brought through the agency of his guardian or his committee.[15] The form of the action—i. e., whether it should be brought in the name of the guardian or committee,[16] or in the name and behalf of the non compos by his guardian or committee[17]—depends upon the statutes or local practice of the forum.

§ 314. Unauthorized acts—Liability for

Where a person acting for a non compos does so without authority, he is liable personally for the costs incurred. This is true of a regularly appointed guardian,[18] as well as of a next friend and a guardian ad litem. However, it would seem that the rule should only be applied when there is such a flagrant overstepping of authority as to suggest recklessness or a want of good faith. Otherwise, actions by guardians and next friends would be discouraged to such an extent as likely to lead to a neglect of the interest of the non compos, as persons would hesitate to act where they would invite losses to themselves. The appeal of a non compos even from a judgment of commitment, where allowed, may be prosecuted, it would seem, by a next friend, where there is no regularly appointed guardian, as it is the right

14 Bradford v. Mackenzie, 89 Md. 763, 43 A. 923.

15 See supra, § 309.

16 Bird's Committee v. Bird, 21 Grat. (Va.) 712; Byrnes v. Byrnes' Minors, 111 La. 403, 35 So. 617; McClun v. McClun, 176 Ill. 376, 52 N. E. 928; Decennial and Other Key-Number Digests, Insane Persons, ⟸92.

17 Gibson v. Shull, 251 Mo. 480, 158 S. W. 322; Dixon v. Cardozo, 106 Cal. 506, 39 P. 857; Decennial and Other Key-Number Digests, Insane Persons, ⟸92.

18 Sikes v. Crissman, 35 Mich. 96.

of every one to have his rights, and none is more valuable than his liberty, passed on by the appellate courts;[19] but he cannot maintain such an appeal as against the regular guardian.[20] It has been held that a non compos may repudiate an action brought in his behalf, but this is denied in Texas.[21] The true rule is, likely, that he will be allowed to repudiate such action, if it is shown that he has recovered his reason sufficiently to understand and appreciate the nature and consequence of his act in so doing.[22] Any other rule would seem to be illogical. In line with this, it has been held that such non compos may not dismiss an appeal taken in his behalf, unless it is made to appear that he has gained full control of his reason and is not acting from coercion.[23] Such appeal or writ of error may be prosecuted by a different person than the one who acted as such in the trial court.[24]

§ 315. Right of recovery, in general

As a general rule, it may be said that an insane person's right to recover on a chose in action is not affected by his insanity, although the form of action to enforce such a recovery may be circumscribed, as we have seen supra. The limitation of such recovery is the question of possible prejudice to the non compos, providing, of course, the right to recover is shown in the first instance; and these will be taken up under the respective heads ante.

[19] Lindly v. Lindly, 102 Tex. 135, 113 S. W. 750.

[20] Penniman v. French, 2 Mass. 140; E. B. v. E. C. B., 28 Barb. (N. Y.) 299; King v. McLean Asylum of the Massachusetts General Hospital, 64 F. 325, 21 U. S. App. 407, 12 C. C. A. 139, 26 L. R. A. 784.

[21] Edwards v. Edwards, 14 Tex. Civ. App. 87, 36 S. W. 1080; Holland v. Riggs, 53 Tex. Civ. App. 367, 116 S. W. 167.

[22] Isle v. Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513; Howard v. Howard, 87 Ky. 616, 9 S. W. 411, 1 L. R. A. 610; Lindly v. Lindly, 102 Tex. 135, 113 S. W. 750; Holland v. Riggs, 53 Tex. Civ. App. 367, 116 S. W. 167.

[23] Combs v. Combs (Ky.) 82 S. W. 298.

[24] Iaga v. Iaga, 168 Ill. 339, 48 N. E. 30, 39 L. R. A. 115, 61 Am. St. Rep. 120.

§ 316. Right of recovery for tort

Stated as a general rule, an insane person may recover for an injury occasioned through the tort or negligence of another in the same manner and to the same extent as a normal person. The fact that a person has lost his reason should not expose him to the wrongful or negligent acts of another, but the fact of his incompetency should rather charge other persons with an added duty to avoid injury to one so obviously unable to take care of himself, and his lessened capacity to recognize and appreciate danger should make it imperative that a higher degree of care be used by others in dealing with him than is ordinarily exercised in dealing with normal persons.[25] This rule has been held to apply to intoxicated persons, as well,[26] though there is a noticeable reluctance on the part of courts to so hold, inasmuch as intoxicated persons are looked upon as being in such helpless condition though their own fault and act.

§ 317. Insanity as element of damages, in general

Whether insanity resulting from the wrongful or negligent act of another is such an injury as will entitle the injured person, or his heirs, relations, etc., to damages as for tort, is a question that seems to have been before the courts but few times, and in the cases actually adjudicated, the opinions handed down are not so clear or full as could be wished. In some respects, the decisions seem to be in conflict with one another, and to contain much that is mere dictum; but, by disregarding some broad expressions and looking to the principles actually decided, in the light of the facts in each particular case, we think the following rules may be considered as established:

[25] Robinson v. Cone, 22 Vt. 213, 54 Am. Dec. 67; Decennial and Other Key-Number Digests, Insane Persons, ⟸87.

[26] Williams v. Mudgett, 2 Posey, Unrep. Cas. (Tex.) 254; Brown v. Stevens, 136 Mich. 311, 99 N. W. 12.

§ 318. In absence of physical injury

Where there is no material physical injury resulting from the wrongful act complained of, but only mental derangement results, unaccompanied by physical injury, as a result of severe mental and nervous disturbance growing out of fright, anxiety, and mental suffering caused by the alleged negligent act, the rules of law governing recovery for mental suffering, unaccompanied by physical injury, is held to control, and a recovery is denied. The argument advanced in support of this position seems to be that, since damage for mental suffering unaccompanied by physical injury is considered too remote and speculative for it to be recognized as a basis for recovery, any affection or disorder of the mind resulting from such mental suffering, excitement, or anxiety will be still more remote and speculative, and if a recovery for the former is denied there would be a still stronger reason to deny recovery in the latter.

§ 319. Reason for the rule

The leading case in support of this is that of Haile's Curator v. Texas & P. R. Co.[27] In this case, the injury was alleged to be insanity brought on by mental suffering and hardship, occasioned by the negligent act of the defendant railway company, no accompanying physical injury being claimed. The court sustained a demurrer directed at the cause of action as pleaded, stating the grounds for the rule as follows:

"While the defendant, as a common carrier, had reason to anticipate that an accident would cause physical injury, and would produce fright and excitement, it had no reason to anticipate that the latter would result in permanent injury, as a disease of the mind, or other disease that might be caused by excitement, exposure, and hardship sometimes incident to travel. If the disease was not likely to result from the accident, and was not one that the defendant could have reasonably foreseen in the

[27] 60 F. 557, 9 C. C. A. 134, 23 U. S. App. 80, 23 L. R. A. 774.

light of attendant circumstances, then the accident was not the proximate cause. The defendant had no reason to anticipate that the result of the accident on its road would so operate on Haile's mind as to produce disease—the disease of insanity—any more than the exposure and hardship he suffered would produce grippe, pneumonia, or any other disease. He sustained no bodily injury by the accident, so far as the petition shows; but it caused a shock and excitement, which, under the peculiar mental and physical condition at the time, resulted in his insanity. The defendant owed him the duty to carry him safely—not to injure his person by force or violence. It owed him no duty to protect him from fright, excitement, or hardship that he might subsequently suffer because of the unfortunate accident."

§ 320. Mental anguish

It has been held that mental anguish suffered by an insane person by reason of the negligent act of another will not be allowed as the basis for damages.[28] But this rule has been very much limited by later decisions, which seem to hold that a showing must be made that a person is so mentally affected that he cannot suffer mental anguish before the rule will apply.[29] The argument advanced seems to be that, while conditions may exist where persons have their minds so clouded by madness that they are unable to appreciate any change in their health, comfort, or capacity caused by the act of another, and, as a consequence, do not actually suffer mental pain and anguish through regret for the loss which they do not realize, etc., yet that fact must be shown before it can be accepted. Merely showing that a person has become insane from the time of an injury will not be sufficient, since mental suffering is presumed from an injury,[30] and "there is no rule of law that would authorize a court to say that one afflicted with melancholy (or other form of insanity) could

28 Western Union Tel. Co. v. Tweed (Tex. Civ. App.) 138 S. W. 1159.
29 Tweed v. Western Union Tel. Co., 107 Tex. 247, 166 S. W. 696.
30 Texas & P. R. Co. v. Curry, 64 Tex. 85.

not experience mental anguish or any of the emotions that constitute mental suffering." [31] The idea seems to be that common experience shows that the normal mind will experience anxiety, fright, excitement, and other disagreeable and painful sensations, if placed in a position calculated to produce the same, as, for example, where one is placed in a position where the immediate and inevitable result seems likely to culminate in great bodily harm, or where an injury has caused a change in health, comfort, or capacity, such as will likely prey upon the mind and be a matter of serious regret to the recipient. This is so usually the result that the law will imply that it did happen where the circumstances are such as will likely produce it, whether the person is sane or insane. But where it can be, and is, shown that the person in question was so mentally defective that he did not sufficiently realize surrounding circumstances as to be capable of receiving disagreeable impressions from them, a different rule would result.

§ 321. General rule

It is suggested that where, from the nature of the facts, mental suffering could be anticipated as the natural and probable result of the wrongful and negligent act, as, for example, in contractual relations where a breach alone gives a right of action, and in those cases [32] where mental anguish is taken as a basis for damage independent of physical injury, insanity alone, resulting from such injury, could be recovered for. Examples of this class of cases are seen in cases of mental anguish growing out of breaches of promise to marry, and in cases against telegraph companies for mental anguish growing out of negligent failure to deliver "death messages" and similar telegrams intrusted to them for delivery. As indicated, it is now the generally accepted rule that mental anguish so occasioned may be shown as an element of damage, without reference to whether it is accompanied

[31] Tweed v. Western Union Tel. Co., 107 Tex. 247, 166 S. W. 696.
[32] Towns on Torts, pp. 118, 168; Sedgwick, El. Dam. p. 106.

by actual physical injury.[33] We see no reason why this same rule should not apply as well to permanent mental injury; e. g., insanity resulting from mental disturbance, disappointment, and anxiety growing out of the above class of cases. Similarly, where it is held that an act, intentional in itself, and committed with the intention of injuring the sufferer, will form the basis for a recovery for mental anguish suffered therefor, regardless of physical injury,[34] we think it would be equally true that, where the injury so intentionally inflicted results in the insanity of the injured party, the insanity may be recovered as an element of damages.[35] Any other rule would be illogical, as many cases are of record where malicious acts, through fear, grief, or other forms of mental suffering induced thereby, have driven persons into raving maniacs, and certainly, if the mental anguish so inflicted could be recovered on, the same would be true of the mental derangement resulting therefrom. Therefore we take it that the rule would be that, where the temporary injury—i. e., mental pain and suffering—could be recovered on, a like recovery could be had where the temporary injury has crystallized into a permanent injury in the form of permanent mental derangement, and such loss of mind could be made the basis for a recovery of damages, regardless of accompanying physical injury.

[33] Warren v. Boston & M. R. R., 163 Mass. 484, 40 N. E. 895; Consolidated Traction Co. v. Lambertson, 59 N. J. 297, 36 A. 100; Texas Mex. Ry. Co. v. Douglas, 73 Tex. 330, 11 S. W. 333; Cowan v. Western Union Tel. Co., 122 Iowa, 382, 98 N. W. 281, 64 L. R. A. 549, 101 Am. St. Rep. 268; Western Union Tel. Co. v. Fergurson, 26 Ind. App. 220, 59 N. E. 416. See International & G. N. Ry. Co. v. Leak, 64 Tex. 654.

[34] Sedgwick, El Dam., p. 107; Towns, Torts, p. 167.

[35] Gulf, C. & S. F. R. Co. v. Hayter, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856; Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 P. 320, 32 L. R. A. 193; Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203.

§ 322. Insanity coupled with physical injury

Where insanity occasioned by the wrongful or negligent act of another is accompanied by physical injury, the rule is somewhat different from the one we have considered supra.[36] "If the plaintiff's mind was destroyed by reason of the injuries he received, such a result * * * would be an element of his damage, * * *" [37] thus following the general rule allowing a recovery for mental anguish when accompanied by physical injury. In addition, where there is physical injury resulting from a wrongful or negligent act, mental anguish may be taken into consideration in estimating the damage, even though the injured party was insane at the time of the injury. "Mental suffering is a presumed consequence of physical injury, and that a person is not of sound mind is not inconsistent with such presumption." [38] The objection that such a presumption could not be allowed where no physical injury is shown, inasmuch as an insane person would not be presumed capable of appreciating a disadvantage or an impending danger, sufficient to suffer mental anguish as a consequence, would not apply where there was accompanying physical injury, since the mind, however diseased, may feel pain and suffer mentally therefrom.

§ 323. Measure of damages

Where the insanity of an injured person may be taken into account by reason of the accompanying physical injury, it may be used in measuring the actual damage sustained by him as a consequence of the act complained of. Though the authorities on the subject are not so explicit as could be wished, it would seem that the court may take into account, in estimating the damage,

[36] Houston & T. C. R. Co. v. Shapard, 54 Tex. Civ. App. 596, 118 S. W. 596.

[37] Western Union Tel. Co. v. Tweed (Tex. Civ. App.) 138 S. W. 1160.

[38] Gulf, W. T. & P. R. Co. v. Holzheuser (Tex. Civ. App.) 45 S. W. 188; 8 R. C. L. 512.

the person's decreased earning capacity, any necessary expense for medicines, medical attendance, and hospital fees, and physical and mental suffering he is shown to have undergone as a proximate result of the injury.[39]

The foregoing is the only logical rule, although the authorities in support of it are not numerous and directly on the point. Where the loss or injury to a person's mind can be traced to the wrongful or negligent act of another, we can see no reason for a departure from the general rule used in meeding out compensatory damages for physical injury resulting from similar causes. The mind is one of the most indispensable members to a useful body. When it suffers injury, the person's mental fitness to attend to business will lower or destroy his earning capacity, the delusions growing out of it may cause him acute mental suffering, and his mental disease may call for expensive medical service and large asylum and hospital fees. To this may be added the fact that he has, by reason of his insanity, become more or less of a burden to his relations and friends, by reason of his helplessness and because of the delusions, which render him dangerous to himself and others, and the fact that his family and dependents have been deprived of his society and protection and support. These injuries are as real and substantial as any occurring from loss of life or limb, and should be placed on the same plane as a predicate for compensatory damages.[40]

[39] Tuttle v. Atlantic City R. Co., 66 N. J. Law, 327, 49 A. 450, 54 L. R. A. 582, 88 Am. St. Rep. 491; Gulf, W. T. & P. R. Co. v. Holzheuser (Tex. Civ. App.) 45 S. W. 188; Campbell v. Fisher (Tex. Civ. App.) 24 S. W. 661. See International & G. N. R. Co. v. Leak, 64 Tex. 654.

[40] Tuttle v. Atlantic City R. Co., 66 N. J. Law, 327, 49 A. 450, 54 L. R. A. 582, 88 Am. St. Rep. 491; Wade v. Le Roy, 20 How. 34, 15 L. Ed. 813; Cole v. Seattle, R. & S. R. Co., 42 Wash. 462, 85 P. 3; Bodfish v. Boston Bridge Works, 88 Conn. 640, 92 A. 407; Wallace v. Western North Carolina R. Co., 104 N. C. 442, 10 S. E. 552; Missouri, K. & T. R. Co. of Texas v. Swift (Tex. Civ. App.) 128 S. W. 450.

§ 324. Extent of recovery

As a general rule, mental injury and the impairment of the mental faculties as an element of damage is so far considered the necessary and probable result of severe physical injury, especially injuries to the skull and nerves, that proof thereof is admissible under general allegations setting up the physical injury, without setting out specifically the resulting insanity. For example, it has been held that allegations that the plaintiff was severely wounded, bruised, and contused in various parts of the person, and received severe internal injuries, such as would incapacitate him from attending to his duties, was sufficient to admit proof that the injuries complained of had resulted in dementium.[41] The reason given for the rule is that the mental faculties are so closely associated with and dependent upon the condition of the body that any serious or permanent injury to the latter will likely affect the former. However, as a matter of good practice, we suggest that the resulting insanity should be alleged, since it results in relatively few cases, not as a usual consequence of physical injury, and the defendant should be apprised of it, in order that he may be prepared to meet the issue.

§ 325. Pleading

As a general rule, permanent mental injury and impairment of the mental faculties may be shown as an element of damage, under allegations of physical injury, where it is reasonably apparent that such mental impairment is the direct result of the physical injuries set out. This is especially true where the injuries are alleged to have occurred to the skull, nervous system, or other organs or parts of the body directly connected with the brain and mind, and the injury to which might be reasonably expected to effect the latter. The reason given for the rule is that the mind is so closely connected with and dependent upon the body that any severe injury to the latter is likely to result in serious

[41] Hoyt v. Metropolitan St. R. Co., 175 N. Y. 502, 67 N. E. 1083.

impairment of the former. Hence such mental injury will be presumed to have been in the contemplation of the negligent or wrongful actor as a natural and probable result of wrongful and negligent injury at the time of its infliction, and it may therefore be shown under the general allegations of injury to the body and mind, without the mental impairment having been specifically pleaded.[42] It is suggested that under this rule mental impairment is considered as growing out of and aggravating the physical injury, rather than as an independent injury springing directly from the wrongful and negligent act. The above rule is stated by the courts in some of the states, as will be seen below; but, in the absence of special exception, demand for a bill of particulars, or other formal objection to the meagerness of the allegations of the pleading, the general rule is as stated above.

§ 326. Kansas-Texas rule

In Texas, Kansas, and several other states the rule discussed in the paragraph above is not followed. The courts of these states seem to hold that, as an impairment of the mental faculties does not necessarily result from ordinary physical injury, however severe, and for that reason, such mental impairment would be in the nature of special damages, and must be specially pleaded in order that the defendant in the action may have proper notice of it. Hence evidence of damage arising from impaired mentality will not be competent, in the absence of pleading setting out that such mental injury had resulted, or probably would result, from the injury complained of.[43]

[42] Decennial and Other Key-Number Digests, Insane Persons, ⟸ 141, 142, 158; Texas & N. O. R. Co. v. McCoy, 54 Tex. Civ. App. 278, 117 S. W. 446; Oölitic Stone Co. of Indiana v. Ridge, 174 Ind. 558, 91 N. E. 944; Saeger v. Wabash R. Co., 131 Mo. App. 282, 110 S. W. 686.

[43] Missouri, K. & T. R. Co. of Texas v. Doyal (Tex. Civ. App.) 142 S. W. 610; Atchison, T. & S. F. R. Co. v. Willey, 57 Kan. 764, 48 P. 25; Lindsay v. Wabash R. Co., 141 Mich. 204, 104 N. W. 656.

§ 327. Contributory negligence

As a matter closely associated with right of action by an insane person for personal injury due to the negligent act of another with respect to the right on the part of such defendant to put it forward in bar or mitigation of the damages arising therefrom is the question of contributory negligence on the part of the alleged non compos sufferer. In the early cases it seems to have been contended that the general rule, making negligence on the part of the injured party a bar to the action where it directly contributed to the injury, should apply to insane as well as normal persons, especially where the insanity was unknown to the other party, as such other party would not be held to the duty of anticipating the negligence of the injured person. It was further contended that the negligence of the relatives and guardian in not keeping the non compos out of danger would be imputed to the non compos and bar his recovery. While the English courts and some of the early decisions of this country tended to this view, the theory was early repudiated. The reply to the contentions was that, inasmuch as the reason for allowing the defense of contributory negligence rested on the theory that, where two persons were equally guilty, the law would refuse to interfere between them, and would let the damage rest where it fell, since the complaining party could not come into court with clean hands, and could not be allowed to charge against another an injury that arose, partially, at least, through his own fault, and since a non compos is incapable of a willful wrong through lack of understanding, the only chargeable wrong in the matter would rest upon the other party, and the law could take no account of that of the insane person. It has therefore become the established rule that, where a person is mentally incapable of comprehending and appreciating a danger, he will not be chargeable with contributory negligence in connection therewith. The question is one of actual deficiency of intellect to the extent that such a one is incapable of comprehending and appreciating the

threatened danger, and mere dullness of intellect will not suffice.[44]

§ 328. Effect of intoxication

It has been a sharp question as to whether intoxication, as a form of mental unsoundness, will excuse contributory negligence. It is now generally held that intoxication falling short of temporary insanity will not excuse want of proper care, where the same is required of normal persons.[45] The reason is that mental derangement existing during intoxication is self-induced, and the reason noted above, which excuses, as less at fault, a person who, though himself negligent, is nevertheless too mentally defective to appreciate the danger, will not be allowed to a person who by his deliberate act produced the condition by which he seeks to excuse himself.

§ 329. Intoxication as contributory negligence

It is a much-mooted question whether or not intoxication itself is contributory negligence, especially where it directly contributes to the injury complained of. It is now the generally accepted rule that intoxication is not in itself contributory negligence.[46] but is a mere circumstance going to prove contributory

[44] Johnson v. St. Paul City R. Co., 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586; Chicago & A. R. Co. v. Becker, 76 Ill. 25; Government St. R. Co. v. Hanlon, 53 Ala. 70; Worthington v. Mencer, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407; Cooley, Torts, 287.

[45] Johnson v. Louisville & N. R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39; Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 P. 269; Mooney v. Pennsylvania R. Co., 203 Pa. 222, 52 A. 191; Vizzacchero v. Rhode Island Co., 26 R. I. 392, 59 A. 105, 69 L. R. A. 188; 10 C. J. 1100; 45 C. J. 997; Herrick v. Washington Water Power Co., 75 Wash. 149, 134 P. 934, 48 L. R. A. (N. S.) 640; Winfrey v. Missouri, K. & T. Ry. Co., 194 F. 808, 114 C. C. A. 218; Decennial and Other Key-Number Digests, tit. Negligence, ⊂88.

[46] Louisville & N. R. Co. v. Cummins' Adm'r, 111 Ky. 333, 63 S. W. 594, 23 Ky. Law Rep. 681; Kingston v. Ft. Wayne & E. R. Co., 112

negligence, and that any degree of intoxication is a circumstance that may be taken into consideration in determining the question of contributory negligence.[47]

§ 330. Tort against property—Recovery for

As an insane person may take and hold property, it is necessary that his possession and enjoyment of the same be duly protected as in the case of a normal person. Indeed, the law places additional safeguards about him, in view of his helpless condition. It is therefore held that an insane person may recover, as for conversion, where he is induced to part with possession of property by fraud or undue influence.[48] Likewise it has been held that an action in tort will lie where he has been induced to make a trade to his prejudice,[49] and equity may be appealed to, to restrain threatened disposition of property so obtained, or the threatened use of security for notes or other property secured fraudulently from a non compos.[50] It is held that an insane person may recover of one who has in the course of official duties come into possession of property of the non compos and has allowed another to secure possession of it. For example, it is held that the superintendent of an asylum is responsible for value of property brought to the institution by a non compos patient, where he surrendered the same to an adverse claimant having no right to it, and this even where the rules of the institution permitted him to do so.[51] Trespass on the land of a non compos person may be recovered for, and without regard to the good

Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131; Buddenberg v. Chas. P. Choteau Transp. Co., 108 Mo. 394, 18 S. W. 970.

47 Alexander v. Humber, 86 Ky. 565, 6 S. W. 453, 9 Ky. Law Rep. 734; Rhyner v. Menasha, 107 Wis. 201, 83 N. W. 303; Ford v. Umatilla Co., 15 Or. 313, 16 P. 33; Cogdell v. Wilmington & W. R. Co., 130 N. C. 313, 41 S. E. 541.

48 Hagar v. Norton, 188 Mass. 47, 73 N. E. 1073.

49 Devereaux v. Hubbard, 117 Mich. 119, 75 N. W. 450.

50 Heath v. Capital Sav. Bank & Trust Co., 79 Vt. 301, 64 A. 1127.

51 Worsham v. Vogtsberger, 60 Tex. Civ. App. 602, 129 S. W. 157.

faith of the trespasser.[52] In the absence of malice, possibly coupled with a showing of actual injury sustained, a non compos will have no cause of action against one who causes him to be arrested and restrained by reason of alleged insanity, and a finding that he is insane will be a prima facie proof of probable cause of such detention;[53] nor has such a person, ordinarily, a cause of action against a physician on whose testimony he is sent to such an asylum.[54]

§ 331. Release of chose in action—Right to

As an insane person may not dispose of his property recklessly, it follows that he may not release a chose in action, except under very limited circumstances. The reason for the rule is that such a release has the same practical effect upon his property rights in the chose of action as would the gift or sale by him of his corporeal property. Therefore public policy forbids that he be allowed to dispose of such property recklessly and for an inadequate consideration, to become a charge upon public charity, and the ordinary rules of justice forbid that he be left to the mercy of the unprincipled, who might take advantage of his lack of understanding to prey upon him.

§ 332. Degree of required to avoid release

The degree of mental unsoundness required to avoid a release is stated in various terms, but all such terms amount to practically the same thing. Some cases give the measure of the capacity as the mental inability "to properly transact business."[55]

[52] Decennial and Other Key-Number Digests, tit. Trespass, ⇐ 25 (vv); Scribner v. Young, 111 App. Div. 814, 97 N. Y. S. 866.

[53] Figg v. Hanger, 4 Neb. (Unof.) 792, 96 N. W. 658.

[54] Niven v. Boland, 177 Mass. 11, 58 N. E. 282, 52 L. R. A. 786; Decennial and Other Key-Number Digests, tit. Release, ⇐ 15; Texas & P. R. Co. v. Crow, 3 Tex. Civ. App. 266, 22 S. W. 928, writ of error refused 93 Tex. 651, 29 S. W. xix; 24 A. & E. Enc. Law, 303.

[55] Johnson v. Gulf, C. & S. F. R. Co., 36 Tex. Civ. App. 487, 81 S. W. 1197.

Other cases state the test of mental capacity to execute a release as being whether such party has capacity to make a contract.[56] Yet other cases make it depend on the question of whether such person "understood the nature of the instrument" when the release was presented to him for execution.[57] We think the general rule may be stated to be that the binding powers of such a release will depend on whether or not the maker had the capacity to understand the nature and appreciate the effect of such release at the time it was executed.[58] However, the actual degree of mental power required will depend very largely upon the circumstances surrounding the case. A smaller degree of mental incapacity will be required to justify the setting aside of a release obtained under circumstances suggesting fraud, overreaching, or even an inadequate consideration than will be required in the case of a release received by the person for whose benefit it is made without knowledge of the maker's insanity, or executed under equitable circumstances and for a fair consideration. In the former case, it has been frequently held that such a release was voidable, where the grantor, by reason of pain, weakness, opiates, or other temporary causes, was for the time unable to exercise proper judgment in the matter, even though there was, strictly speaking, no permanent insanity.[59] On the other hand, mental weak-

[56] State ex rel. Cardwell v. Stuart, 111 Mo. App. 478, 86 S. W. 471.

[57] Roberts v. Central Lead Co., 95 Mo. App. 591, 69 S. W. 630.

[58] Missouri, K. & T. R. Co. of Texas v. Brantley, 26 Tex. Civ. App. 11, 62 S. W. 94; Union Pac. R. Co. v. Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. Ed. 1003; Och v. Missouri, K. & T. R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; Kelly v. Chicago, R. I. & P. R. Co., 138 Iowa, 273, 114 N. W. 536, 128 Am. St. Rep. 195; Cleere v. Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750; Texas & P. R. Co. v. Hubbard (Tex. Civ. App.) 169 S. W. 1058; Atchison, T. & S. F. R. Co. v. Smith (Tex. Civ. App.) 190 S. W. 761; Decennial and Other Key-Number Digests, tit. Release, ⇐15.

[59] Decennial and Other Key-Number Digests, tit. Release, ⇐15; 14 A. & E. Enc. Law, 303; Missouri, K. & T. R. Co. of Texas v. Craig, 52 Tex. Civ. App. 611, 114 S. W. 850; Gulf States Tel. Co. v. Evetts (Tex. Civ. App.) 188 S. W. 289.

ness, or weakness or lack of judgment, will not operate to avoid the release, in the absence of inequitable circumstances or overreaching on the part of the other party.[60]

[60] Missouri Pac. Ry. Co. v. Brazzil, 72 Tex. 233, 10 S. W. 403; 14 A. & M. Enc. Law, 303; Decennial and Other Key-Number Digests, tit. Release, ⚖15.

CHAPTER 10

STATUS WITH REFERENCE TO OBLIGATION

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§ 333. Obligations in general

The present rules of law governing the rights and liabilities of the insane with reference to their contractual obligations have resulted from the attempt on the part of the courts to protect both the rights of the non compos individual and those of the public at large. On the one hand, there has been a tendency to relieve the non compos of all liability on the ground that he is incapable, from want of mind, of assuming such a liability; on the other, public policy has demanded that contractual obligations, once entered into, be not held lightly or set aside at pleasure, since they affect property rights which public policy protects. The result is that the rules of law evolved have been largely a compromise between the two principles, or views, and cases

more frequently turn upon the particular facts of the case in hand. When this is kept in mind, apparent lines of conflict disappear. Therefore, while we may lay down a few general principles of law, the particular rules will usually be found under the class to which its facts assign it in common with others of its class.

§ 334. Contractual responsibility

The policy of the law, which attempts to have the non compos meet his obligations, and yet protects him from imposition that might result from his own follies and indiscretions, has resulted in the general rule that an insane person cannot be held responsible for obligations ordinarily arising from exercise of reason, but that he will be held on those obligations arising independent of reason to the same extent as normal persons; that is to say, in ordinary contractual relations the law will intervene in his behalf; but it will not do so in those cases where his assent is implied by the law, as in cases of taxes, etc. This is the general rule only, and is subject to numerous modifications and exceptions, as will be seen in the succeeding paragraphs.

§ 335. Reason and limitation of rule

It is fundamental that a contract is made by the meeting of the minds of the contracting parties on the subject-matter of the contract. The controlling element is the voluntary will and judgment of the respective parties, through which they meet on a common understanding. Where one of the contracting parties is without will or reason, there can be no meeting of minds, for the obvious reason that such incompetent has no mind to meet with that of the other party to the contract. Upon this theory, it is held, especially in the federal courts, that an insane person is incapable of entering into a valid and binding contract, and upon a strict construction of the rule it is held in some jurisdictions that such a contract so entered into by him is void and nonenforceable, independent of any action on the part of the

non compos.[1] But this unbending rule, founded strictly upon technicalities, has been much modified by practical application in other courts. Since the sole purpose of the rule is to protect the non compos against the consequences of his own indiscretion, there is no equitable reason for its enforcement beyond the point necessary to secure that end. It is therefore the better rule, recognized in Texas and in most of the states of the Union, that such a contract is not void, but voidable only.[2] In some of the jurisdictions, the courts have gone further, and held that a non compos may not avoid a debt for the purchase of goods or property made prior to his being adjudged insane, where the other party had no notice of such insanity, the transaction was a fair one, and such other party could not be put back in statu quo;[3] but the more generally accepted rule is as we have stated above.

§ 336. Exception to the rule

Since the exemption here granted to the non compos is merely for his protection, it has been said that it is the intention of the law that it be used "as a shield, not as a sword;" "not to do in-

[1] Redden v. Baker, 86 Ind. 191; Dougherty v. Powe, 127 Ala. 577, 30 So. 524; Burke v. Allen, 29 N. H. 106, 61 Am. Dec. 642; Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73; Edwards v. Davenport, 20 F. 756, 4 McCrary, 34.

[2] Simpkins, Cont. p. 93; Wolcott v. Connecticut General Life Ins. Co., 137 Mich. 316, 100 N. W. 572; Lancaster County Nat. Bank v. Moore, 78 Pa. 407, 21 Am. Rep. 24; Missouri Pac. Ry. Co. v. Brazzil, 72 Tex. 239, 10 S. W. 403; Decennial and Other Key-Number Digests, Insane Persons, ⟸72, 73; Ætna Life Ins. Co. v. Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; Atwell v. Jenkins, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694, 47 Am. St. Rep. 463; Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402, 19 L. R. A. (N. S.) 461, 123 Am. St. Rep. 609, 14 Ann. Cas. 505; Eagle v. Peterson, 136 Ark. 72, 206 S. W. 55, 7 A. L. R. 553; Riley v. Carter, 76 Md. 581, 25 A. 667, 19 L. R. A. 489, 35 Am. St. Rep. 443; Scott v. Hay, 90 Minn. 304, 97 N. W. 106; Gribben v. Maxwell, 34 Kan. 8, 7 P. 584, 55 Am. Rep. 233; Mann v. Keene Guaranty Sav. Bank of Keene, N. H., 86 F. 51.

[3] Flach v. Gottschalk Co., 88 Md. 368, 41 A. 908, 42 L. R. A. 746, 71 Am. St. Rep. 418.

jury, but to prevent it." [4] It is therefore held in some states, notably in Louisiana, that, where the non compos is not under guardianship, knowledge of his insanity must be brought home to the other party before contracts, under which property has passed or valuable rights have been acquired, can be set aside or avoided.[5] But this cannot be taken as a general rule.

§ 337. Extent of insanity

Mere weakness of the understanding and dullness of the intellect will not of itself be sufficient ground for the avoidance of a contract, in the absence of fraud or undue influence.[6] Something more is required, and, while the courts and text-writers have used various terms to express the means by which the necessary degree of mental capacity required in such case may be determined, practically all of them recognize in one form or another two essentials, or rather two deficiencies, viz., the promulgator of a contract must have sufficient mental capacity at the time of the making thereof to understand and appreciate, first, the nature of the transaction, and, second, the consequence or effect of the contractual act.[7]

[4] Hall v. Butterfield, 59 N. H. 355, 47 Am. Rep. 209; Sanford v. Sanford, 62 N. Y. 557; Squier v. Hydliff, 9 Mich. 274; Allen v. Berryhill, 27 Iowa, 540, 1 Am. Rep. 309; Holden Taft & Co. v. Pike, 14 Vt. 405, 39 Am. Dec. 228.

[5] Louisiana Bank v. Dubreuil (La.) 5 Mart. (O. S.) 416, 425; Stockmeyer v. Tobin, 139 U. S. 176, 11 S. Ct. 504, 35 L. Ed. 123; Ashcraft v. De Armond, 44 Iowa, 229; Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686; Martinez v. Moll, 46 F. 726.

[6] Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Milks v. Milks, 129 Mich. 164, 88 N. W. 402; Aldrich v. Bailey, 132 N. Y. 85, 30 N. E. 264; Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383; Carnagie v. Diven, 31 Or. 366, 49 P. 891; Moore v. Cross, 87 Tex. 557, 29 S. W. 1051; Martin v. Harsh, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000; Loman v. Paullin, 51 Okl. 294, 152 P. 73; Elwood v. O'Brien, 105 Iowa, 239, 74 N. W. 740.

[7] 1 Parsons, Contracts (9th Ed.) p. 443, and note; 2 Page, Contracts, § 894; Raymond v. Wathen, 142 Ind. 367, 41 N. E. 815; Barlow v.

First. The maker of the contract must have sufficient mental capacity to see the facts connected with the transaction in their true relation to one another, must be able to determine the kind, use, and approximate value of the property involved, and what he is getting and parting with, and must be able to understand the nature of the act itself.

Second. He must be able to comprehend the effect of the act involved in the making of the contract, and be reasonably able to calculate its probable result. For example, to have capacity to contract, one must understand his rights in the property, its value and use, the nature of the consideration, that the effect of the sale will be to deprive him of further rights in the property, etc. The mere fact that the non compos has not sufficient will power or intelligence to drive a good bargain, or that he acted unwisely, even foolishly, from a business standpoint, would not be ground to rescind the contract, in the absence of a showing of a state of facts which will amount to fraud or overreaching on the part of the other party to the contract.[8]

In some jurisdictions, the question of whether a contract is void, or merely voidable, is made to turn upon the quantum of the insane person's mental capacity; e. g., where a total lack of mental capacity is shown, such contracts are held to be void, but, where less than a total lack of mental capacity is shown, the contract is held to be voidable only.[9] This distinction has not met with general approval, and cannot be considered as a general rule.

Strange, 120 Ga. 1015, 48 S. E. 344; Aldrich v. Bailey, 132 N. Y. 85, 30 N. E. 264; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514.

[8] Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 182, 111 Am. St. Rep. 827; Buckey v. Buckey, 38 W. Va. 168, 18 S. E. 383; Aldrich v. Bailey, 132 N. Y. 85, 30 N. E. 264; Miller v. Rutledge, 82 Va. 863, 1 S. E. 202.

[9] French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856; Adams Oil & Gas Co. v. Hudson, 55 Okl. 386, 155 P. 220; Van Deusen v. Sweet, 51 N. Y. 378.

§ 338. Duration of insanity necessary

No special duration or length of mental unsoundness is required, so long as it exists at the time of the contractual act and is of a sufficient degree to meet the above requirements. It is held that temporary insanity is sufficient to render a contract voidable, if it is shown that the party seeking to take advantage of it was insane at the time of the contract,[10] or under guardianship as a non compos person;[11] but in such case the presumption seems to be against the incompetency, and in favor of the validity of the contract, under the general rule with reference to the burden of proof in the case of temporary insanity.[12]

§ 339. Quasi mental incompetency

Closely related to the incompetency to enter into a contract arising from insanity proper is the incompetency or incapacity due to the absence or stopping of the channels through which information is conveyed to the brain. An example of the first is found in the rule that a person who is deaf and dumb is prima facie without power to contract, or rather proof of that fact is prima facie showing sufficient to render a contract executed by such a person voidable;[13] but this presumption may be rebutted by showing that such deaf and dumb person actually could understand the nature and result of the transaction sought to be avoided.[14] For example, such a person may have been informed through the medium of deaf and dumb alphabet, or by written

[10] Curtis v. Brownell, 42 Mich. 165, 3 N. W. 936; In re Gangwere's Estate, 14 Pa. 417, 53 Am. Dec. 554; Reed v. Reed, 108 Va. 790, 62 S. E. 792; Smith v. Smith, 108 N. C. 365, 12 S. E. 1045; Ramsdell v. Ramsdell, 128 Mich. 110, 87 N. W. 81.

[11] Crouse v. Holman, 19 Ind. 30.

[12] Staples v. Wellington, 58 Me. 453.

[13] Barnett v. Barnett, 54 N. C. 221; Alexter v. Matzke, 151 Mich. 36, 115 N. W. 251, 123 Am. St. Rep. 255, 14 Ann. Cas. 52.

[14] Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187; Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441; Collins v. Trotter, 81 Mo. 275.

words, fully as to the facts involved. Blindness alone is not sufficient to establish incompetency.[15]

An example of the second condition referred to in the succeeding paragraph is that of intoxication on the part of the person seeking to avoid the contract. Here a new element comes in, which materially alters the equitable aspect of condition, viz., the fact that the condition of the incompetent is largely due to his own fault in voluntarily entering into the state of intoxication, and this may be taken into account.[16] It seems to be the general rule that where a person is so intoxicated at the time of the making of a contract as to impair the mental faculties to the extent of rendering him non compos mentis, the contract will be voidable at his option,[17] and such transactions have been held to be void where the drunkard has been judicially declared incompetent and placed under guardianship.[18] But innocent parties, dealing with such intoxicated person in good faith, will ordinarily be protected on the theory that the condition was brought about through the fault of the intoxicated person, and that, where one of two persons must suffer, the loss should rightly fall on him who is most to blame for the loss having occurred,[19] except where the drunkenness has become habitual, and the drunkard has been placed under guardianship, in which case it would seem that this rule would not apply, inasmuch as the fact

15 Griffin v. Collins, 122 Ga. 102, 49 S. E. 827.

16 See supra, § 53.

17 Wells v. Houston, 23 Tex. Civ. App. 629, 57 S. W. 584; Waldron v. Angleman, 71 N. J. Law, 166, 58 A. 568; Burns v. O'Rourke, 28 N. Y. Super. Ct. 649; Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848; Cameron-Barkley Co. v. Thornton Light & Power Co., 138 N. C. 365, 50 S. E. 695, 107 Am. St. Rep. 532; Decennial and Other Key-Number Digests, Contracts, ⇐92.

18 Philadelphia Trust, Safe & Deposit Ins. Co. v. Allison, 108 Me. 326, 80 A. 833, 39 L. R. A. (N. S.) 39; Anderson v. Hicks, 150 App. Div. 289, 134 N. Y. S. 1018; Cockrill v. Cockrill, 92 F. 811, 34 C. C. A. 254; Devin v. Scott, 34 Ind. 67.

19 McSparran v. Neeley, 91 Pa. 17; Matter of McGarvey, 64 How. Prac. (N. Y.) 135.

of guardianship is notice to the world of the incompetent's unfortunate condition, and all persons deal with him at their peril.[20] However, the mere fact that a person is an habitual drunkard, or is intoxicated at the time a contract is made, is not sufficient to justify an avoidance of the contract, in the absence of a showing that the effect has been to render the person non compos mentis.[21]

§ 340. Right of avoidance—Extent

The right of an insane person to avoid his contract is personal to himself, his guardian or committee, or his heirs and personal representatives after his death, and it cannot be taken advantage of by the opposite party to such contract.[22] This is obvious, since the rule is made for the benefit of the non compos, to protect him against imposition on the part of such other party, and is not for the benefit of the other party.

However, this position is not without opposition. It is contended that, inasmuch as such a contract, if not actually void, is at least voidable at the option of the non compos party who is actually in no way bound by it, and therefore it is really without consideration as to the opposite party, who has no means of enforcing it and securing the fruits thereof, in consideration of which he has in turn bound himself. It is further contended that such contract is unilateral and unenforceable as to the normal party, inasmuch as it has no binding effect upon the incompetent party. All of this is met by the assertion that a voidable promise is sufficient consideration to support a contract, since the purpose and end of such a contract is not effected until the right of avoidance is exercised, and that, the right of avoidance being for

[20] Wadsworth v. Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499.

[21] Case Threshing Mach. Co. v. Meyers, 78 Neb. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970; Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101; Martin v. Harsh, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000; Wright v. Waller, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440.

[22] Vogel v. Zuercher (Tex. Civ. App.) 135 S. W. 737; Harmon v. Harmon, 51 F. 113; Howe v. Howe, 99 Mass. 98.

the benefit of the non compos and for his protection only, its exercise cannot be anticipated, and a normal person dealing with the non compos has no such right to anticipate it, and thereby acquire a corresponding right of avoidance. Since such is the rule with reference to contracts by infants, it is contended that it should apply with equal force to other incompetents, including insane persons.[23]

Not only may the avoidableness of a contract executed by an insane person not be taken advantage of by the other party to such contract, but it may not ordinarily be taken advantage of by strangers, or persons who are merely privies in estate,[24] except possibly in those states where the contract of an insane person is held to be absolutely void, and not merely voidable.[25]

§ 341. Time within which to act

If it is the purpose of the non compos to avoid or disaffirm a contract voidable because of his incapacity, he must do so within a reasonable time after his recovery. In jurisdictions where his contracts are held to be voidable only, his failure to exercise the right of disaffirmance will amount to a tacit affirmance, and estop him from asserting the right of disaffirmance he has allowed to become stale.[26] In the jurisdictions where the contractual acts of the non compos are held to be void, not merely voidable, the rule is not so clear. Following the general rule that a void act cannot be ratified, since the affirmance would in effect amount

[23] Townes, Elem. Law, pp. 200–202.

[24] Vogel v. Zuercher (Tex. Civ. App.) 135 S. W. 739.

[25] Burke v. Allen, 29 N. H. 106, 61 Am. Dec. 642.

[26] Eagle v. Peterson, 136 Ark. 72, 206 S. W. 55, 7 A. L. R. 553; Morris v. Great Northern Ry. Co., 67 Minn. 74, 69 N. W. 628; Skinner v. Schwab, 188 App. Div. 457, 177 N. Y. S. 143; White v. Holland (Tex. Civ. App.) 229 S. W. 611; West v. Seaboard Air Line R. Co., 151 N. C. 231, 65 S. E. 979; Weber v. Bottger, 172 Iowa, 418, 154 N. W. 579; Ætna Life Ins. Co. v. Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481; Arnold v. Richmond Iron Works, 1 Gray (Mass.) 434; Wood v. Newell, 149 Minn. 137, 182 N. W. 965; Decennial and Other Key-Number Digests, Insane Persons, ⚖79.

to a new contract, requiring a new consideration, it would seem to logically follow that, unless some element of estoppel intervened, the failure of the non compos to disaffirm such a contract would not amount to an affirmance of the same.[27] But it has been held in this connection that such an affirmance, or implied affirmance, is nevertheless a matter of defense, and must be pleaded by the party seeking to take advantage of it.[28]

§ 342. Effect of insanity on negotiations

The insanity of one of the parties pending negotiations looking to the making of a contract will at once put an end to such negotiations. Since the insane party would be unable to enter into and conclude the contract towards which the negotiations tend, of course, the negotiations would be vain and useless. This is so far true that the negotiations must be taken up anew after the recovery of the insane person, and cannot be merely affirmed.[29] A seeming exception to the rule is found where the consideration of the contract was necessities for the insane person or his family, in which case a recovery may nevertheless be had for the reasonable value of such necessities,[30] which merely follows the rule allowing a recovery for necessities.[31]

In line with the above rules, it is held that, when a person becomes insane before the acceptance of an offer previously made by him is communicated to him by the other party to a proposed contract, no subsequent acceptance of such offer will bind the non compos, since all offers are revoked by the insanity.[32]

[27] Chess v. Chess, 1 Pen. & W. (Pa.) 32, 21 Am. Dec. 350; Merriman v. Blalack, 56 Tex. Civ. App. 594, 121 S. W. 552, 557; Sullivan v. Flynn, 9 Mackey (20 D. C.) 396; Musselman v. Cravens, 47 Ind. 1; Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235.

[28] Alamo Dressed Beef Co. v. Yeargan, 58 Tex. Civ. App. 92, 123 S. W. 721.

[29] Simpkins, Contracts, p. 17.

[30] Grimes v. Shaw, 2 Tex. Civ. App. 20, 21 S. W. 718; Hartley v. Hartley's Estate, 173 Mo. App. 18, 155 S. W. 1099.

[31] See ante, § 350.

[32] Beach v. First Methodist Episcopal Church, 96 Ill. 177.

§ 343. Negotiations based on prior agreements

But the rule which terminates negotiations for the making of a contract, upon the insanity of one of the parties, has been held not to apply, where all the terms of the proposed contract were agreed upon while the party in question was yet sane, and there only remained the carrying out of the undertaking thereunder. For example, it has been held that, where a person has contracted prior to his insanity to convey land, specific performance of the contract can be enforced, even after he has become insane.[33] The contrary rule has been followed in some jurisdictions; but the better reasoning, as well as the weight of authority, seems to be with the first rule, inasmuch as the subsequent act of closing up the transaction upon the terms already agreed upon is largely ministerial in its character and requires the exercise of little reasoning powers. In fact, it is but the carrying out of a duty or obligation owing another, since the minds have already met and the contract has been completed.[34] This would hardly be true, however, where the original agreement was itself not enforceable, as, for example, where such person orally agreed to buy land, which would be nonenforceable, because it came under the statute of frauds.[35]

Much the same rule would likely apply to transactions with intoxicated persons.[36]

§ 344. Good faith of opposite party as affected by

There has been some conflict among the decisions of the different states as to how far an insane person's right of disaffirmance would be affected by the fact that the other party to the contract in question was wholly ignorant of such insanity and

[33] See post, note 50; Haines v. Scott, 35 App. Div. 515, 54 N. Y. S. 844.

[34] Bush v. Breinig, 113 Pa. 310, 6 A. 86, 57 Am. Rep. 469.

[35] Bush v. Breinig, 113 Pa. 310, 6 A. 86, 57 Am. Rep. 469.

[36] Bush v. Breinig, 113 Pa. 310, 6 A. 86, 57 Am. Rep. 469.

acted in good faith in the matter. In those jurisdictions where the contract of the non compos is held to be void, not voidable only, it is reasoned that, since the non compos party to the contract was wholly without contractual capacity, because of the absence of a mind to contract with, the good faith of the other party to the transaction would have nothing to do with the matter, and could not vitalize a contract which never came into existence.[37] Furthermore, since estoppel is based on the idea of inequitable conduct on the part of the party against whom the estoppel is said to operate, which has led another to make such changes in his affairs that he cannot be placed in statu quo, and such conduct cannot be imputed to a non compos person, the doctrine of estoppel cannot be called in to support a nudum pactum, merely because the other party would be put to a disadvantage.[38] This means that the insane person is allowed to repudiate the obligations of the transaction and at the same time retain the considerations received under it.

§ 345. General rule

The manifest hardships worked by the rule above discussed has led to a different rule in a majority of the states where the contract of one insane is held to be voidable only. This is especially evident in the later decisions. It is contended with force that it would be highly unjust to allow a person, merely because he is mentally unsound, to enjoy the fruits of a contract without giving something in return, or that an insane person be allowed to recover back what he has attempted to convey without being required to return that which he himself has received thereunder. This is especially true where the contract is reasonable with reference to the advantage accruing under it to the non compos, and been fully executed, and the opposite party cannot be put back

[37] American Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167.

[38] Anglo-Californian Bank v. Ames, 27 F. 727; Schanck v. Hooper (Sup.) 160 N. Y. S. 627.

into the same position he occupied before the contract was entered into.

It therefore seems to be the better rule, supported by the decisions of the courts of a majority of the states, that a non compos, not under guardianship at the time of the contract in question, will not be allowed to repudiate an executed contract, where the other party to such contract has acted in good faith and without knowledge of such insanity, and cannot be put back in statu quo with reference to the matter, unless it be shown that such other party should be charged with knowledge of the insanity, that the transaction was without adequate consideration, or that there were other circumstances which would render the transaction inequitable.[39] But where such other person can be put back in statu quo, the mere fact that the contract would have been an advantage to it will not prevent its rescission.[40] This rule is denied by the courts of a few states, who insist that the doctrine of innocent purchaser is no defense, even where the lunatic's contract is voidable only.[41]

§ 346. Rule in Texas

The rule in Texas is somewhat different from both rules we have discussed supra. In that state it is held that an insane per-

[39] Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686; Flach v. Gottschalk Co., 88 Md. 368, 41 A. 908, 71 Am. St. Rep. 418, 42 L. R. A. 745; Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686; Bank v. Sneed, 97 Tenn. 120, 36 S. W. 716, 34 L. R. A. 274, 56 Am. St. Rep. 788; Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666, 111 Am. St. Rep. 827, 3 L. R. A. (N. S.) 174; Ferrell v. Childress, 172 Ky. 760, 189 S. W. 1149; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720; Decennial and Other Key-Number Digests, Insane Persons, ⊜73.

[40] Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 488; Woolley v. Gaines, 114 Ga. 122, 39 S. E. 892, 88 Am. St. Rep. 22; Fulwider v. Ingels, 87 Ind. 414.

[41] Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Orr v. Equitable Mortg. Co., 107 Ga. 499, 33 S. E. 708.

son may avoid his contracts, and recover back his property where conveyed, without reference to the good faith of the other party to the transaction,[42] and without it being necessary for him to return the consideration received thereon, unless such consideration has been expended for necessities or for the benefit of the insane person's estate,[43] or unless the consideration is still in the hands of such insane person, in which case it can be recovered in specie.[44]

§ 347. Return of consideration—Necessity for

While there is considerable conflict among the authorities as to the necessity for the return of the consideration received under a contract made by an insane person, as a condition precedent to its avoidance by such non compos, there are several fairly well defined rules with reference to it. While the tender of a return of the consideration is not ordinarily a condition precedent to such an avoidance of the contract,[45] yet the other party can usually recover so much of the consideration as remains in the insane person's control,[46] or has been used by him for neces-

[42] White v. Holland (Tex. Civ. App.) 229 S. W. 611; Williams v. Sapieha, 94 Tex. 433, 61 S. W. 115, 116, 86 Am. St. Rep. 864; Brown v. Brenner (Tex. Civ. App.) 161 S. W. 14, 16.

[43] First Nat. Bank of Navasota v. McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495.

[44] First Nat. Bank of Navasota v. McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495; Bullock v. Sprowls, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. Rep. 849; Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115; Wisdom v. Peek (Tex. Civ. App.) 220 S. W. 210.

[45] Wisdom v. Peek (Tex. Civ. App.) 220 S. W. 210; Gibson v. Soper, 6 Gray (Mass.) 279, 66 Am. Dec. 414; Bates v. Hyman (Miss.) 28 So. 567; Wager v. Wagoner, 53 Neb. 511, 73 N. W. 937.

Contra: Miller v. Barber, 73 N. J. Law, 38, 62 A. 276.

[46] Hudson v. Union & Mercantile Trust Co., 148 Ark. 249, 230 S. W. 281; Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115; Jordan v. Kirkpatrick, 251 Ill. 116, 95 N. E. 1079; Rea v. Bishop, 41 Neb. 202, 59 N. W. 555; Arnold v. Richmond Iron Works, 1 Gray (Mass.) 434.

sities,[47] or for some beneficial purpose.[48] Where such other party knew of the insanity of the incompetent party and took advantage of it, there is no necessity for the return of the consideration, and the same is true where the consideration was not beneficial to the insane person, and was wasted and dissipated by him.[49] The cases usually turn on the particular facts of the case in question, it being the policy of the courts to require the insane person to do equity to the other party as far as may be without injury to his own rights.

§ 348. Contracts made prior to insanity

Contracts made prior to a party becoming insane are not ordinarily affected by his subsequent insanity.[50] We doubt if a different rule could be established, even by statute, inasmuch as such a statute would likely be declared unconstitutional, as impairing the obligation of a contract, and therefore unenforceable. The obligations and rights of the respective parties having been fixed prior to such party's insanity, the vested rights could hardly be upset by legislative enactment. Where in such a case the judgment of insanity is made to relate back, so as to include the prior transaction, such judgment would at least be prima facie evidence of insanity during such time.[51]

[47] Williams v. Sapieha, 94 Tex. 430, 61 S. W. 115.

[48] Physio-Medical Coll. of Ind. v. Wilkinson, 108 Ind. 314, 9 N. E. 167.

[49] Jordan v. Kirkpatrick, 251 Ill. 116, 95 N. E. 1079; Jefferson v. Rust, 149 Iowa, 594, 128 N. W. 954; Reaves v. Davidson, 129 Ark. 88, 195 S. W. 19; First Nat. Bank of Rogers v. Tribble, 155 Ark. 264, 244 S. W. 33.

[50] Sands v. Potter, 59 Ill. App. 206; Potter v. Berry, 53 N. J. Eq. 151, 32 A. 259, 34 L. R. A. 297, 51 Am. St. Rep. 626; 32 C. J. 729; Memphis Nat. Bank v. Sneed, 97 Tenn. 120, 36 S. W. 716, 56 Am. St. Rep. 788, 34 L. R. A. 274; Hines v. Potts, 56 Miss. 346; Stigers v. Brent, 50 Md. 214, 33 Am. Rep. 317; Gross v. Jones, 89 Miss. 44, 42 So. 802.

[51] In re Gangwere's Estate, 14 Pa. 417, 53 Am. Dec. 554; Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 632, 15 Am. St. Rep. 386.

§ 349. Contracts made after guardianship

The rules we have considered in the preceding paragraphs apply to contracts made by insane persons who have not been subject to inquisition or placed under guardianship. A different rule is held to obtain where the non compos has been adjudged insane, or a guardian or committee has been appointed. In such case, it seems to be the rule that a contract made under these circumstances will be void, unless the non compos has been restored to the control of his property at the time the contract is entered into.[52] The reason for this rule is well expressed in the case of Imhoff v. Witmer's Adm'r:[53] "The object * * * was protection and guardianship over persons and estates of parties wanting capacity to take proper care of either, and to preserve the property of such from being squandered or improvidently used, to their own injury and that of their families, if they have any. It is not necessary to adduce reasons to prove the self-evident proposition that to admit the capacity of control to exist in the lunatic or habitual drunkard over his estates, after inquisition settling his condition in this respect, or submit it to be controverted by evidence of lucid intervals or sobriety at the moment of contracting, would leave the estates of unfortunate classes about as much exposed as before proceeding had in regard to them. The inquisition and decree, standing of record, was intended for notice to all of the incapacity of the particular party to contract. It is the judgment of the law to this effect, and, as a consequence, his acts in regard to his property are absolutely void while the condition exists."

[52] Perry, Trusts (4th Ed.) § 35; Elston v. Jasper, 45 Tex. 409; Simpkins, Contracts, p. 93; American Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167; Redden v. Baker, 86 Ind. 193; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; American Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167; Teegarden v. Lewis, 145 Ind. 98, 40 N. E. 1047.

[53] Imhoff v. Witmer's Adm'r, 31 Pa. 243.

Where the defense of insanity is set up to avoid a contract, the opposite party may counter by showing the proceeding, under which such person was declared insane, was in fact void;[54] but a mere showing that such proceeding was irregular would not be sufficient.[55]

§ 350. Contracts for necessities

A seeming exception to the general rule that the contracts of a non compos are voidable is that which gives force to contracts for the procuring of necessities. Such implied obligation is considered as being merely confirmative of an obligation existing independent of express contracts, since under an implied contract the insane person is liable for the reasonable value of necessities furnished him and his family, if he has one.[56] This seems to be the most universal rule, and has been held to apply to persons adjudged insane, as well as to those not so adjudged,[57] provided, of course, the guardian himself fails to furnish the necessities.[58] The reason for the rule is very apparent and is twofold: (1) As a matter of humanity and public policy, it is necessary that such unfortunates be provided for. Unless there was some provision for recovering the value of the necessities furnished to supply such wants, there would be little likelihood of any one doing so. In such case, such insane person, however extensive his estate, might be reduced to an object of charity and want. (2) Under the old rule of equity, that the law will imply a promise to give quid pro quo, justice will imply a promise to pay a reasonable equivalent for the benefits actually received,

54 Sears v. Terry, 26 Conn. 273.

55 Kiehne v. Wessell, 53 Mo. App. 667.

56 Decennial and Other Key-Number Digests, Insane Persons, ⟸ 75; 32 C. J. 739; State Commission in Lunacy v. Eldridge, 7 Cal. App. 298, 94 P. 597; Van Horn v. Hann, 39 N. J. Law, 207; Key v. Harris, 116 Tenn. 161, 92 S. W. 235, 8 Ann. Cas. 200.

57 Snyder v. Nixon, 188 Iowa, 779, 176 N. W. 808.

58 Reando v. Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; Schramek v. Shepeck, 120 Wis. 643, 98 N. W. 213; Sawyer v. Lufkin, 56 Me. 308; 22 Cyc. 1201.

and which are necessary and proper for the insane person's comfort and protection. This has been extended to include material and services furnished for the benefit of his separate estate.[59] It has also been held that, as the services of an attorney may be necessary to protect the property and liberty of the non compos, he will be liable for the reasonable value of legal services rendered him by an attorney, but not for any specific amount determined by the promise of the non compos.[60]

§ 351. Joint obligations

As corollary to the rule that the immunity extended to the non compos is restricted to himself, and cannot be taken advantage of by another, it is held that the insanity of one joint obligor will not release a joint obligor, except in case of fraud,[61] nor will the insanity of the principal release the surety.[62] In line with the usual rule of contracts, the subsequent insanity of the surety will not release him from obligation as such.[63]

§ 352. Compromise and release

As a rule, the same mental capacity is required to enter into a binding compromise and settlement as is required in the making of a contract.[64] While the law looks with favor on settlement of differences and the avoidance of litigation, yet its policy of protecting the non compos against loss from his indiscretions

[59] First Nat. Bank of Navasota v. McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610.

[60] In re Freshour's Estate, 174 Mich. 114, 140 N. W. 517, 45 L. R. A. (N. S.) 67, Ann. Cas. 1915A, 726; Carr v. Anderson, 154 Minn. 162, 191 N. W. 407, 26 A. L. R. 557; Carter v. Beckwith, 128 N. Y. 312, 28 N. E. 582; Ferguson v. Fitze (Tex. Civ. App.) 173 S. W. 500.

[61] See ante, § 381.

[62] Caldwell v. Ruddy, 2 Idaho, 1, 1 P. 339; Lee v. Yandell, 69 Tex. 34, 6 S. W. 665.

[63] Webber v. Swift & Co. (Tex. Civ. App.) 226 S. W. 509.

[64] Underwood v. Brockman, 4 Dana (Ky.) 309, 29 Am. Dec. 407; Stone v. Chicago & W. M. Ry. Co., 66 Mich. 76, 33 N. W. 24; Miller v. Best, 36 Ill. App. 74; Cundall v. Haswell, 23 R. I. 508, 51 A. 426.

tends to place such transactions on the same footing as contracts. However, no mere mental weakness short of actual mental incapacity will be sufficient to avoid a compromise openly and fairly entered into.[65] The tendency seems to be for equity to look into each transaction and examine its fairness, especially with relation to the interests of the non compos, keeping in mind that the law favors the settlement of suits out of court, as far as commensurate with the rights of the incompetent individual.

§ 353. Intoxicated persons—Rule applied to

The rules of law relating to compromise by an insane person will apply where the person is intoxicated at the time the compromise is effected, provided, of course, such a person is so intoxicated as to render him incapable of contracting a settlement.[66] The rule rendering such settlement voidable will apply with added force when coupled with imposition, or where it has been induced, directly or indirectly, by the procurement of the opposite party.

§ 354. Bills and notes in general

Notes executed by a non compos person, following the general rules relating to contracts, are voidable at the option of the incompetent maker, or of persons empowered to act for him.[67] There are many expressions of the courts and text-writers whose language would justify a conclusion that such notes are void,[68]

[65] Mitchell's Heirs v. Long, 5 Litt. (Ky.) 71; Paris v. Dexter, 15 Vt. 379; Farnam v. Brooks, 9 Pick. (Mass.) 212; Dickie v. Steiger, 4 Cal. App. 622, 88 P. 814.

[66] Lang v. Ingalls Zinc Co. (Tenn. Ch. App.) 49 S. W. 288; Murray v. Carlin, 67 Ill. 286; Phelan v. Gardner, 43 Cal. 306.

[67] 1 Parsons, Notes and Bills, pp. 149, 150; 1 Daniel Neg. Inst. (5th Ed.) § 210; Edwards, Bills, p. 63; Decennial and Other Key-Number Digests, Insane Persons, ⊂⊃77.

[68] Walker v. Winn, 142 Ala. 560, 39 So. 12, 110 Am. St. Rep. 50, 4 Ann. Cas. 537; Voris v. Harshbarger, 11 Ind. App. 555, 39 N. E. 521; Beasley v. Faust (Tex. Civ. App.) 217 S. W. 179.

but we believe the above is the better and more generally accepted rule. The same rule will apply to a note executed by an intoxicated person; but, where such note has passed into the hands of an innocent purchaser, the maker will not be allowed to avoid it, since he may not make an innocent party suffer for a condition for which he himself is to blame.[69] However, where the maker is shown to have been insane at the time when the note was executed, such note is voidable, even where it has passed into the hands of an innocent purchaser.[70]

§ 355. In Texas

In Texas, and some other jurisdictions, recovery is allowed on notes given by non compos persons, when the consideration therefor was necessities for the non compos or his family.[71] But in such case a recovery can be had only to the extent of the reasonable value of such necessities so furnished.[72] In fact, the recovery is allowed rather on the implied contract for necessities than on the note itself.

§ 356. Minority rule

While the general rule is as we have stated supra, yet there is a line of decisions that cannot be overlooked. They seem to hold that, while the note of the non compos maker is not negotiable, so as to bring it under the law merchant and protect the bona fide holder without reference to prior defenses, yet where there has been a fair and adequate consideration, of which the non

[69] State Bank v. McCoy, 69 Pa. 204, 8 Am. Rep. 246.

[70] Barnes v. McCarthy (Tex. Civ. App.) 132 S. W. 85, 87; First Nat. Bank of Navasota v. McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495; Daniel, Neg. Inst., § 210.

[71] First Nat. Bank of Navasota v. McGinty, 29 Tex. Civ. App. 539, 69 S. W. 496; Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176.

[72] Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720; Shoulters v. Allen, 51 Mich. 529, 16 N. W. 888; First Nat. Bank of Navasota v. McGinty, 29 Tex. Civ. App. 539, 69 S. W. 496.

compos maker has gotten the full benefit, and the rights of an innocent transferee have intervened, such holder will be protected on the general principles of equity. The rule is well expressed in the opinion rendered in the case of Hosler v. Beard, as follows:

"The paper of an insane person, however perfect in form it may be, not having the quality of negotiability within the rule of the law merchant, by reason of the incapacity of the maker, and the holder occupying no better position with respect to it than the original payee, the plea of insanity at the time of the execution is as available, and has the same affect as a defense in a suit by the holder, as if the suit were by the payee. In such case it avoids the note and defeats recovery, unless the plaintiff is able to show it was given for necessities, or that the maker otherwise received an adequate consideration for it, in a transaction that was fair and reasonable on the part of the payee, and without knowledge by him of the maker's mental condition. The requirement is not met nor dispensed with by the mere fact that the holder paid value to the payee for the transfer of the note." [73]

As the transfer of a note involves the making of a contract, it will be subject to the same rules, and may ordinarily be avoided at the option of the non compos transferor.[74]

§ 357. Renewal notes

An apparent exception to the rule that bills, notes, and other obligations of an insane person cannot be enforced arises in the case of the renewal of existing obligations executed in the first instance while such party was in his right mind. It has been suggested that even an accommodation indorser, who has previously indorsed as such while he was sane, and who indorses a

[73] 54 Ohio St. 398, 43 N. E. 1040, 35 L. R. A. 161, 56 Am. St. Rep. 720; Memphis Nat. Bank v. Sneed, 97 Tenn. 120, 36 S. W. 716, 34 L. R. A. 274, 56 Am. St. Rep. 788.

[74] Walker v. Winn, 142 Ala. 560, 39 So. 12, 110 Am. St. Rep. 50, 4 Ann. Cas. 537; Carrier v. Sears, 4 Allen (Mass.) 336, 81 Am. Dec. 707.

renewal without further consideration and without notice to the obligee of his insanity, will be held on such renewal, notwithstanding his insanity at the time the renewal is signed.[75]

The decisions seem to place this rule, or rather this exception to the general rule, on the ground that the obligee is innocent of any wrongdoing, has had no opportunity of protecting himself, and could not be put back in statu quo, and therefore should be protected. To our mind, there is a still stronger and more logical reason for this holding. It is this: Since an insane person is not allowed to execute notes, because it requires the exercise of reasoning powers, which are lacking in his case, and because as a matter of equity and public policy the non compos maker is not allowed to burden his estate with obligations whose propriety he has not the discretion to determine, neither of these reasons would apply from a practical standpoint, because such a renewal is merely an extension of an existing obligation, whose propriety was passed on, and whose existence was called into being, by the exercise of the maker's discretion prior to the time he became insane. While technically it may be a new contract, practically it is a continuation of an existing obligation, and is a mere mechanical process, which calls for the exercise of no discretion or choice of action. Therefore, where there has been no fraud, and the non compos has not been led to give the other any additional advantage by reason of the renewal, there is no reason for the courts to interfere. The advantage is usually with the non compos maker, who is given additional time within which to meet the obligation.

§ 358. Limitation of rule

But, where a renewal is taken after a person has become insane, the antecedent obligation must have been of the same class and binding force as the renewal, since the law will not allow the

[75] Snyder v. Laubach, 7 Wkly. Notes Cas. (Pa.) 464; Wirebach's Ex'r v. First Nat. Bank of Easton, 97 Pa. 543, 39 Am. Rep. 821; Memphis Nat. Bank v. Sneed, 97 Tenn. 120, 36 S. W. 716, 34 L. R. A. 274, 56 Am. St. Rep. 788; 27 Century Digest, Insane Persons, § 131.

obligee to gain a more advantageous position through the renewal so executed. Hence it has been held that a person having an open account against a non compos, incurred prior to such person becoming insane, will not be allowed to merge the same into a written obligation.[76] This will apply with added force where the note taken in renewal provides for attorney's fees, calls for a higher rate of interest than that borne by the original account or note, or added security is taken on it, as either of these would be putting additional burdens upon the insane maker.

But the holder of a note made prior to a person becoming insane will be allowed to recover attorney's fees provided for in such note, as it is part of the contract.[77]

§ 359. Sales of property

Sales of real estate by non compos persons have been considered supra,[78] and reference is made thereto. Sales of personal property have also been treated to some extent.[79] As a general rule, they are governed by the general principles applying to contracts; that is, are voidable at the option of the insane seller or his proper representative.[80] But disaffirmance must be by the non compos, his guardian, or committee during his lifetime,[81] and by his personal representatives and privies in blood after his death.[82] Of course, strangers have no such right, and it has

[76] Schmidt v. Ittman, 46 La. Ann. 888, 15 So. 310; Van Patton & Marks v. Beals, 46 Iowa, 63.

[77] Morrill v. Hoyt, 83 Tex. 59, 18 S. W. 424, 29 Am. St. Rep. 630.

[78] See supra, § 263.

[79] See supra, § 261.

[80] Wichita Land & Cattle Co. v. Ward, 1 Tex. Civ. App. 307, 21 S. W. 128; Hancock v. Haile (Tex. Civ. App.) 171 S. W. 1053.

[81] Bensell v. Chancellor, 5 Whart. (Pa.) 371, 34 Am. Dec. 561; Turner v. Rusk, 53 Md. 65; Ingraham v. Baldwin, 9 N. Y. 45; Domling v. Domling, 128 Mich. 588, 87 N. W. 788; Warfield v. Fisk, 136 Mass. 219.

[82] Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; Hunt v. Rabitoay, 125 Mich. 137, 84 N. W. 59, 84 Am. St.

been held that mere privies in estate, viz., subsequent purchasers, have no such right.[83] Where offer to sell is made by the non compos before he becomes insane, but is not accepted at that time by the other party, the subsequent insanity will revoke the offer.[84] The fact that the property has passed into the hands of an innocent purchaser will not ordinarily prevent an avoidance of the contract;[85] but it has been suggested that a bona fide purchaser under the foreclosure of a mortgage given by an insane person will be protected to the extent that the consideration went to the use and benefit of the insane grantee.[86] It has been held, further, that an innocent purchaser at a sale made under the orders of the court will take an unquestionable title.[87]

§ 360. Bail bonds

An interesting question has sometimes arisen where the sureties on a bail bond have resisted forfeiture on the ground that the principal was insane at the time he failed to appear under the requirements of the bond. On the ground that to produce for trial an insane person would serve no good end, and that sureties should not be penalized where the failure to produce the principal is through no fault of their own or of the principal, whose mental condition has rendered him irresponsible, it is generally held that a showing that the principal is insane will release the sureties on the bond,[88] especially where he is confined in an asy-

Rep. 563; Langley v. Langley, 45 Ark. 392; Northwestern Mut. Fire Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185.

[83] Wagner v. Harriott, 10 N. Y. St. Rep. 709; Key's Lessee v. Davis, 1 Md. 32.

[84] Beach v. First Methodist Episcopal Church, 96 Ill. 177.

[85] Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Gates v. Carpenter, 43 Iowa, 152.

[86] Chamblee v. Broughton, 120 N. C. 170, 27 S. E. 111; Creekmore v. Baxter, 121 N. C. 33, 27 S. E. 994.

[87] Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 493; Dunn v. Dunn, 114 Cal. 210, 46 P. 5; Crawford v. Thomson, 161 Ill. 161, 43 N. E. 617.

[88] Smith v. People, 67 Colo. 452, 184 P. 372, 7 A. L. R. 392; Com. v. Fleming, 15 Ky. Law Rep. 491; Fuller v. Davis, 1 Gray (Mass.) 612.

lum for that reason. But the courts have refused to extend this rule to civil cases, holding that the insanity of the principal will not release the bondsman in such cases,[89] and have generally held that the escape of the principal before he has been adjudged a lunatic and confined in an asylum will not affect the liability of the sureties.[90] The same would be true where the sureties were instrumental in sending the alleged insane principal to an asylum out of the court's jurisdiction.[91]

§ 361. Checks

Checks, being of the general nature of contracts, will ordinarily be governed by the rules of law relating to contracts, especially those rules relating to commercial paper, viz., they are not protected by the law merchant where they fall into the hands of innocent purchasers, and may be avoided by the non compos drawer, by his guardian, or by his privies in blood. Where the drawer of a check has been adjudged a lunatic, it seems to be held that his control over funds deposited in bank cease, and he cannot longer check on them. This has been carried so far as to hold that a bank honoring the check of an adjudged lunatic must refund the amount paid out on the same, even when the proceedings declaring the depositor insane were had in a different state and without knowledge of the bank.[92]

A bank and its depositor stand in the relation of debtor and creditor, and it is a somewhat difficult matter to determine the duty of a bank to its depositors, who have become insane, especially where it does not appear that the bank actually knows of the mental condition of the depositors. The leading case on the subject is that of American Trust & Banking Co. v. Boone,[93]

[89] Bowerbank v. Payne, 2 Wash. C. C. 464, Fed. Cas. No. 1,727; Ibbotson v. Galway, 6 T. R. 133, 101 Eng. Reprint, 474.

[90] Com. v. Allen, 157 Ky. 6, 162 S. W. 116, 50 L. R. A. (N. S.) 252.

[91] Adler v. State, 35 Ark. 517, 37 Am. Rep. 48.

[92] American Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167; 5 R. C. L. 542.

[93] American Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 167.

already noted above. This case seems to lay down the rule that a bank is without authority to pay out funds on the check of an insane depositor, and without reference to whether it has actual knowledge of the depositor's insanity or not. Apparently, however, this decision is predicated upon the idea that any contractual act of an insane person is void and without force to pass title to the funds in question. The effect, under such a view, would be as if the funds were paid out without any check whatever being drawn.

In those jurisdictions where the contractual acts of one insane are held to be merely voidable, and especially where the rights of innocent purchasers are recognized and protected, a different rule would likely control. The relation of the parties being that of debtor and creditor, and a check being in fact but an assignment of the fund owing by the bank to the depositor, there is no reason why the rules relating to assignments should not control, so far as the payee of the check is concerned; i. e., it would be good until avoided or when given for necessities, and the bank could hardly be said to have made the transfer of the funds without authority, so as to subject it to liability, unless it be shown that it knew of the depositor's insane condition, or was charged with knowledge of it because of his having been declared a lunatic and placed under guardianship.

§ 362. Subscription contracts

A subscription contract is in the nature of a standing offer to contribute money or things of value towards a stated end, when the object of the subscription is carried out or its completion gotten under way. It is usually without consideration, except such advantage as might be expected to accrue to the subscriber as a member of a community for whose benefit the subscription might be made. Therefore, where the subscriber becomes insane before acceptance, and before a consideration is furnished for such subscription by entering upon and carrying out the end for which the subscription was made, the insanity of the sub-

scriber will operate as a revocation of his subscription.[94] This seems to be the general rule in the American states.

§ 363. Specific performance

As a general rule, specific performance cannot be had against a non compos person. Since he cannot ordinarily be held for acts of a contractual nature entered into after he became insane,[95] it necessarily follows that a specific performance of such an unenforceable contract cannot be had. This general rule is, however, subject to several important exceptions.

§ 364. Of prior contract

Where the contract or act upon which the action for specific performance is founded was made or entered upon before the insanity of the person against whom it is sought to be enforced, it is held that the subsequent insanity cannot reach the contract entered into previous thereto, provided the remedy cannot be reached in the changed status of the individual in question.[96] Therefore, where the non compos, prior to the time he became insane, promised the performance of an act not involving personal skill, etc., or the exercise of intelligent action, the promisee can ordinarily demand specific performance thereof.[97] For example, where the insane person, previous to his becoming insane, contracted to convey land or an interest therein, specific performance of such contract may be enforced against his guardian and privies in blood.[98] In such cases, the guardian or com-

94 Beach v. First Methodist Episcopal Church, 96 Ill. 177; School Dist. of Kansas City v. Sheidley, 138 Mo. 672, 40 S. W. 656, 37 L. R. A. 406, 60 Am. St. Rep. 576.

95 See supra, § 335.

96 Owens v. Davis, 1 Ves. 822, 27 Eng. Reprint, 905.

97 Hall v. Warren, 9 Ves. 605, 7 Rev. Rep. 306, 32 Eng. Reprint, 738; Yauger v. Skinner, 14 N. J. Eq. 389; Swartwout v. Burr, 1 Barb. (N. Y.) 495.

98 Haines v. Scott, 35 App. Div. 515, 54 N. Y. S. 844; Owens v. Davis, 1 Ves. 82, 27 Eng. Reprint, 738; In re Cuming, L. R. 5, Ch. 72, 21 L. T. Rep. (N. S.) 739, 18 Wkly. Rep. 157.

mittee may be directed by the court of equity to execute the conveyance for the non compos, since it is a mere ministerial act.

The rule with reference to specific performance of previously made contracts is equally applicable where the non compos is one of several joint obligors, such as makers of joint leases or contracts for conveyance of joint interests in land, etc.,[99] or where the insane person is one of several partners who have jointly obligated themselves to execute a deed.[1]

§ 365. Contracts of ancestors

Another condition arises with reference to the enforcement of specific performance against a non compos, where the ancestor of such insane person has executed a contract or promised some act calling for specific performance. In such case, the insane heir can inherit nothing more than the ancestor was himself entitled to, and would take the property charged with all equities which had attached to it during the lifetime of such ancestor. Hence it has been held that specific performance of a contract made by the ancestor with reference to his property can be fully enforced against the insane heir, and the guardian or committee can be charged by the courts with the duty of carrying out such specific performance.[2]

§ 366. Assignments for benefit of creditors

It is held that an assignment for the benefit of creditors is rendered voidable by the insanity of the maker.[3] The creditors are placed in no worse position by the revocation of the assignment, and it gives opportunity for the administration of the estate by the guardian to the better advantage of the non compos.

[99] Pegge v. Skinner, 1 Cox, Ch. 23, 29 Eng. Reprint, 1043; In re Doolan, 2 C. & L. 232, 3 Dr. & War. 442.

[1] Lawrie v. Lees, 14 Ch. Div. 249, 49 L. J. Ch. 636, 42 L. T. Rep. (N. S.) 485, 28 Wkly. Rep. 779.

[2] Swartwout v. Burr, 1 Barb. (N. Y.) 495.

[3] Riley v. Carter, 76 Md. 581, 25 A. 667, 19 L. R. A. 489, 35 Am St. Rep. 443.

Gifts made by an insane person are voidable,[4] since they are without advantage to the non compos and open the way to great imposition upon him, and a relatively smaller amount of mental weakness than necessary in the execution of a contract will suffice to set them aside.[5] This has reference to gifts made during the lifetime of the lunatic. Those made after his death will be treated under the head of Wills, ante.[6]

§ 367. Insurance policy, in general

An insurance policy is in the nature of an indemnity contract between the insurer and the insured, and is affected by insanity in much the same way as other contracts. As the insurer is almost invariably a company, the practical effect is confined to the change in the status of the parties by reason of the insanity of the insured. Following the general rule that insanity cannot operate to the advantage of the opposite party, a contract of insurance will not ordinarily be affected by the insanity of the insured, so far as it relates to the obligation on the part of the insurer to maintain the protection provided for in the policy. The real application comes in attempting to measure the changed obligation of the insured to carry out the terms resting upon him.

§ 368. Suicide clause, in general

The most usual example of the effect of an insured's insanity upon the insurance policy is seen in conditions therein as the same relate to the insured. The effect of such insanity upon the conditions in the policy, in the nature of warranties, more often appears in policies relating to life and accident insurance, and

[4] Matthews v. Hoagland, 48 N. J. Eq. 455, 21 A. 1054; Richardson v. Smart, 152 Mo. 623, 54 S. W. 542, 75 Am. St. Rep. 488; Riggs v. American Tract Soc., 95 N. Y. 503; Telford v. Patton, 144 Ill. 611, 33 N. E. 1119; Davis v. Kuck, 93 Minn. 262, 101 N. W. 165.

[5] Ellis v. Mathews, 19 Tex. 390, 70 Am. Dec. 353; Riggs v. American Tract Soc., 95 N. Y. 503; Teegarden v. Lewis, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9.

[6] See ante, § 457 et seq.

vary under the rules in force in the different states of the Union. The most usual instance where the question arises is under the breach of what is commonly known as the "suicide clause" of the standard life policy; i. e., a clause in the nature of a condition, or warranty, providing that the policy shall become void and nonenforceable upon the insured taking his own life. Other forms of wording, such as "self-killing," "suicide," "self-destruction," and "dying by his own hand," have been held to be synonymous.[7] Where brought into question with reference to life insurance policies, insanity is considered as a disease, and death resulting from it will be considered as though resulting from any other disease, and as, therefore, included in the risks insured against. As a result, and in the absence of any provision in the policy to the contrary, suicide by an insane person will not work a forfeiture of his policy, notwithstanding the presence in the policy of the suicide clause, since his death will not be attributed to his act, but to the involuntary result of his diseased brain.[8] From the use of this clause in the policy of life insurance, and the interpretation placed thereon, there has grown up two well-defined rules of law, viz.:

§ 369. English rule

The first rule with reference to the interpretation of the suicide clause in the life insurance policy is what is known as the English rule, laid down in the leading case of Borradeil v. Hunter, and is to the effect that, where an insured takes his life in violation of the express terms of his contract of insurance, the

[7] Mutual Life Ins. Co. v. Terry, 15 Wall. 580, 21 L. Ed. 236; 7 Words and Phrases, First Series, 6405.

[8] Central Mut. Life Ins. Ass'n v. Anderson, 195 Ill. 135, 62 N. E. 838; Connecticut Mut. Life Ins. Co. v. Groom, 86 Pa. 92, 27 Am. Rep. 689; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 3 S. Ct. 99, 27 L. Ed. 878; Eastabrook v. Union Mut. Life Ins. Co., 54 Me. 224, 89 Am. Dec. 743; Blackstone v. Standard Life & Acc. Ins. Co., 74 Mich. 609, 42 N. W. 161, 3 L. R. A. 493; Penn Mut. Life Ins. Co. v. Roberts, 207 Ky. 524, 269 S. W. 736.

policy will be void, irrespective of the state of his mind at the time the act is committed.[9] The position taken is that this condition in the policy is intended as an express guard against the extra risk of life destruction, and that the condition and risk would be the same, whether the insured was sane or insane. In addition, the suicide is possibly contemplated at the time the policy is taken out, and this may be true, even when such person is insane at that time, as an insane person often has the cunning to prepare for his contemplated self-destruction. This rule has been followed in but few of the American states.[10]

§ 370. New York rule

As opposed to the above stands what is known as the New York rule. Under such rule, death by suicide of an insured under a life insurance policy having the suicide clause will not work a forfeiture of the policy, where the insured at the time the act is committed is so mentally unbalanced as to be unable to understand and appreciate the nature and result of the act. The reasons given in support of the rule are twofold: First, it is pointed out that insanity is well recognized as a disease, as much so as consumption or any other infection of the body, and where the insane person kills himself under the influence of the insane delusion growing out of such mental affection, the disease of the mind which impels it, and not the act of the insured, is the proximate cause of such death.[11] Hence it is considered that the in-

[9] Borradial v. Hunter, 5 Man. & G. 639; Clift v. Schwabe, 2 Car. & K. 134, 3 C. B. 437, 17 L. J. C. P. (N. S.) 2.

[10] Cooper v. Massachusetts Mut. Life Ins. Co., 102 Mass. 227, 3 Am. Rep. 451; Dean v. American Mut. Life Ins. Co., 4 Allen (86 Mass.), 96. Contra, Masonic Life Ass'n v. Pollard's Guardian, 121 Ky. 349, 89 S. W. 219, 28 Ky. Law Rep. 301, 123 Am. St. Rep. 198. See 35 L. R. A. 259; Nimick v. Mutual Ben. Life Ins. Co., 18 Fed. Cas. No. 10266, 3 Brewst. (Pa.) 502.

[11] Ray, Med. Jur. § 54, p. 82; Hammond Treaties on Insanity, 265; Bigelow, L. & Acc. Ins. Rep. 736; John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41; Connecticut Mut. Life Ins. Co. v. Groom, 86 Pa. 97, 27 Am. Rep. 689; Eastabrook v. Union Mut. Life Ins. Co., 54 Me.

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sured does not die "by his own hand," as forbidden by the policy, but as a result of the disease of the brain. Second, the suicide, or self-destruction, contemplated by the suicide clause, is the voluntary taking of one's own life, since one is only presumed to enter into a contract to do that which lies within the range of his physical powers and conceptions, and when his mind is so clouded by insanity that he has no intelligent control over his acts, he is incapable of acting intelligently, and the clause will not apply.[12] The New York, or more properly speaking, perhaps, the American, rule, seems to be favored by the courts of this country, and is followed by a decided majority of the states of the Union.[13]

§ 371. "Sane or insane" addition to suicide clause

To meet the construction the courts have placed on the "suicide clause," and which practically nullifies it, the insurers have added to such clause a provision to the effect that it shall operate to avoid the policy, whether the insured was sane or insane at the time of the act. It is held by the courts that this provision in its new form is reasonable, and will operate to render the policy void, however violently insane the insured may be at the time of the suicide.[14] This has been denied in a few jurisdic-

227, 89 Am. Dec. 743; St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush (Ky.) 270; Mutual L. Ins. Co. v. Terry, 15 Wall. (82 U. S.) 589, 21 L. Ed. 241.

[12] Van Zandt v. Mutual Ben. Life Ins. Co., 55 N. Y. 169, 14 Am. Rep. 215; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 237, 24 L. Ed. 434.

[13] Blackstone v. Standard Life & Acc. Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; Breasted v. Farmers' Loan & Trust Co., 8 N. Y. 299, 59 Am. Dec. 494; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 122, 3 S. Ct. 99, 27 L. Ed. 879; Connecticut Mut. Life Ins. Co. v. Akens, 150 U. S. 468, 14 S. Ct. 155, 37 L. Ed. 1148; New Home Life Ass'n of Illinois v. Hagler, 29 Ill. App. 437; Seitzinger v. Modern Woodmen of America, 204 Ill. 58, 68 N. E. 478; Mauch v. Supreme Tribe of Ben Hur, 184 N. Y. 527, 76 N. E. 1101; Robson v. United Order of Foresters, 93 Minn. 24, 100 N. W. 381; Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209.

[14] Illinois Bankers' Life Ass'n v. Floyd (Tex. Com. App.) 222 S. W.

tions, on the ground that, when the insured covenants not to take his life while insane, he covenants to do a thing which is known to both parties to be impossible of observance, and that it therefore cannot be insisted on by the insurer, since it is unreasonable.[15] But by far the majority of the states hold to the rule above stated, and give full force to the amended clause. Self-inflicted death while insane is held to be "accidental," within the meaning of that term in an accident insurance policy.[16]

§ 372. Applied to accident insurance

A clause, corresponding to the "suicide clause" in life insurance policies, is frequently used in accident insurance policies. It is variously worded, but provides in effect that no recovery can be had under the policy for "self-inflicted injuries." This clause has received practically the same construction as the suicide clause in the life policy; i. e., where the insured is so mentally deranged as to be unable to understand and appreciate the act resulting in the injury, it will not avoid the policy, even

967; Brown v. United Moderns, 39 Tex. Civ. App. 343, 87 S. W. 357; Pierce v. Travelers' Life Ins. Co., 34 Wis. 389; Scherar v. Prudential Ins. Co., 63 Neb. 536, 88 N. W. 687, 56 L. R. A. 614; Bigelow v. Berkshire L. Ins. Co., 96 U. S. 284, 23 L. Ed. 918; De Gororza v. Knickerbocker Life Ins. Co., 65 N. Y. 232; Seitzinger v. Modern Woodmen of America, 204 Ill. 58, 68 N. E. 478; Spruill v. Northwestern Mut. Life Ins. Co., 120 N. C. 141, 27 S. E. 39; Manhattan Life Ins. Co. v. Beard, 112 Ky. 455, 66 S. W. 35; Zerulla v. Supreme Lodge Order of Mutual Protection, 223 Ill. 518, 79 N. E. 160; Decennial and Other Key-Number Digests, Insurance, ⇐446; Century Digest, Insanity, § 1159.

15 Kelley v. Mutual Life Ins. Co. of New York, 109 F. 56 (questioned in Mutual Life Ins. Co. of New York v. Kelly, 114 F. 268); Metropolitan Life Ins. Co. v. Thomas, 106 S. W. 1175, 32 Ky. Law Rep. 770.

16 Brunswick v. Standard Accident Ins. Co., 278 Mo. 154, 213 S. W. 45, 7 A. L. R. 1213; Accident Ins. Co. v. Crandal, 120 U. S. 531, 7 S. Ct. 685, 30 L. Ed. 742; Andrus v. Business Men's Accident Ass'n of America, 283 Mo. 442, 223 S. W. 70, 13 A. L. R. 779; Weber v. Interstate Business Men's Accident Ass'n, 48 N. D. 307, 184 N. W. 97, 16 A. L. R. 1390.

when self-inflicted.[17] It is likely that, where the phrase "sane or insane" is added, the construction given in life policies will be followed, and the act held to avoid the policy.[18]

In cases where a notice is required in an accident policy to be given within a reasonable time, the insanity of the injured party may operate to extend such time.[19]

§ 373. Applied to drunkenness

Where policies of insurance provide for avoiding the policy where the insured has impaired his health by the intemperate use of intoxicants or drugs, insanity resulting from the excessive use of either will not take the case out of the suicide clause of the policy.[20] This follows the rule that one may not plead their own wrong in extenuation of their acts, the condition sought to be avoided having been brought on by their deliberate act.

§ 374. Extent of insanity

There has been some question as to the degree of mental derangement necessary to avoid the effect of the suicide clause, but it may be stated as the general rule that it is necessary for the insane person to have been so deranged as to have been unable to understand and appreciate, at the time, the probable result of the act, and that it would result in his death,[21] or, if he did know that it would result in his death, then that he did not

[17] Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. Ed. 740; Bacon v. United States Mut. Acc. Ass'n, 44 Hun (N. Y.) 599, 604; Blackstone v. Standard Life & Acc. Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484.

[18] Tuttle v. Iowa State Traveling Men's Ass'n, 132 Iowa, 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 228; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 8 S. Ct. 1360, 32 L. Ed. 308; Cotter v. Royal Neighbors of America, 76 Minn. 518, 79 N. W. 542.

[19] Metropolitan Casualty Ins. Co. of New York v. Johnston, 247 F. 65, 159 C. C. A. 283; 7 L. R. A. 175.

[20] Jarvis v. Connecticut Mut. Life Ins. Co., 13 Fed. Cas. No. 7226.

[21] Masonic Life Ass'n of Western New York v. Pollard's Guardian,

have sufficient mind to resist the act of self-destruction.[22] Where the policy provides for the avoidance of the policy by self-inflicted acts, where the insured was sane or insane, a majority of the courts have been uniform in holding that the language used applies to every degree of insanity.[23] There are cases which have attempted to limit the effect of the provision by holding that it applied only to those cases where the mind was deranged, but not to the extent that the person was unable to understand and appreciate the probable result of the suicidal act, and committed it with the suicidal act in view; but that, where he was so deranged as not to be able to understand and appreciate the probable result of the act, it would not be considered as his act at all, but considered as a mere accident, occurring from the vagaries of the diseased mind, and would not avoid the policy, notwithstanding the provision of the policy.[24] While this argument is ingenious, it does not seem to have received the approval of many of the courts, and the generally accepted rule would be otherwise, as we have stated supra. However, it has been held that there must have been an actual derangement or mental disorder, and not a mere error in judgment.[25] A mistake resulting from an error in judgment,[26] even when contributed to by a weak mentality, will not be suicide.

121 Ky. 349, 89 S. W. 219, 123 Am. St. Rep. 198; Ritter v. Mutual Life Ins. Co., 169 U. S. 139, 18 S. Ct. 300, 42 L. Ed. 693.

[22] Van Zandt v. Mutual Ben. Life Ins. Co., 55 N. Y. 169, 14 Am. Rep. 215; Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209; Manhattan Life Ins. Co. v. Beard, 112 Ky. 455, 66 S. W. 35.

[23] Spruill v. Northwestern Mut. Life Ins. Co., 120 N. C. 141, 27 S. E. 39.

[24] Metropolitan Life Ins. Co. v. Thomas, 106 S. W. 1175, 32 Ky. Law Rep. 770.

[25] Moore v. Connecticut Mut. Life Ins. Co., Fed. Cas. No. 9,755. 1 Flip. 363; Weed v. Mutual Ben. Life Ins. Co., 70 N. Y. 561; Van Zandt v. Mutual Ben. Life Ins. Co., 55 N. Y. 169, 14 Am. Rep. 215; Borrodaile v. Hunter, 5 Man. & G. 639, 7 Jur. U. R. 418.

[26] Campbell v. Supreme Conclave Improved Order Heptasophs, 66 N. J. Law, 276, 49 A. 550, 54 L. R. A. 576.

§ 375. As liquidating policy

Some interesting questions have arisen with respect to the effect of insanity upon the provisions of insurance policies looking to its liquidation. In this connection, it is held that, where the terms of a policy provide for certain benefits in case the insured is incapacitated to attend to his affairs through sickness, etc., insanity or mental weakness which renders the insane unfit to attend to business affairs, entitled him to the benefits called for in the policy.[27] Similarly, in an accident policy, insanity resulting from injury will be taken into account in estimating the benefits due.[28] Some of the cases seem to hold that an insured who has become insane is entitled to sick benefits under a policy of insurance providing for such benefits, as insanity has always been regarded from a medical standpoint as the effect of some disease of the brain, and therefore a physical ailment.[29] We would suggest that the evident intent of such contracts of insurance is to insure against physical disability arising from natural causes, and, as the effect of insanity would be to fulfill these conditions, the spirit of the contract would demand that it be included.

§ 376. Liquidation caused by insane beneficiary

A further phase of the liquidation of a policy of insurance or fraternal beneficial certificate is presented where the insured is killed or injured by a beneficiary, or the insured property is injured or destroyed by the person entitled to collect the insur-

[27] McCullough v. Expressman's Mut. Ben. Ass'n, 133 Pa. 142, 19 A. 355, 7 L. R. A. 210.

[28] Hilmer v. Western Travelers' Acc. Ass'n, 86 Neb. 285, 125 N. W. 535, 27 L. R. A. (N. S.) 319.

[29] Burton v. Eyden, L. R., 8 Q. B. 295; Kelly v. Ancient Order of Hibernians, 9 Daly (N. Y.) 292; Pellazzino v. German Catholic St. Joseph's Society, 16 Wkly. Law Bul. (Ohio) 27; Robillard v. Société St. Jean Baptiste de Centreville, 21 R. I. 350, 43 A. 635, 45 L. R. A. 560, 79 Am. St. Rep. 806; Niblock, Mut. Ben. Soc. 173.

ance, and such person killing or injuring the insured, or destroying the property, is in fact insane at the time of the act. The reasons which oppose a recovery in such cases are twofold, viz.: First, the general rule in insurance law is that an insured cannot recover for loss brought about by his own wrongful act,[30] and since it is held to be against public policy to allow even insane persons to profit by their wrongful acts,[31] such a rule would apply to insane persons. Second, an insane person is liable for the damage arising out of his tortious acts, and under that general rule, is subject to a civil action for wrongfully destroying property or causing the death of another.[32] Therefore the insurers should be allowed to set their claim for damages for the tortious acts against the claim of the assured or his guardian and estate for any amount due under the policy which would itself be the amount of damage suffered by the insured. As one amount would, therefore, offset the other, the effect would be to nullify the right of recovery under the policy.

§ 377. General rule of insurer's liability

As opposed to the contentions set out above, it is pointed out, first, that the rule which denies to the person recovery for loss occasioned through their own wrong contemplates that the wrong should be an intentional one, and no rule of public policy would punish a person who was mentally incapable of understanding and profiting by such punishment. Second, that the rule requiring an insane person's estate to answer in damages for his torts is founded upon the axiom that, where a loss must fall upon one of two persons, it should be borne by the one who

[30] Thompson v. Hopper, 6 El. & Bl. 191; Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. Ed. 997; Hatch v. Mutual Life Ins. Co., 120 Mass. 550, 21 Am. Rep. 541.

[31] Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349; Cooley, Torts, pp. 97 et seq.; Greenhood, Pub. Pol. pt. 1, rule II.

[32] Jewell v. Colby, 66 N. H. 399, 24 A. 902; Porter, Insurance, § 129 et seq. See § 437 et seq.

caused it.[33] Further, it is a recognized rule of insurance law that no loss occasioned by the act of the insured will relieve the insurer of liability under the policy, unless in violation of express contract, or the act of the insured causing the loss amounts to fraud, or such gross negligence as to raise a presumption of fraud,[34] inasmuch as the insurer, as a part of the consideration for the premium paid, has assumed all risks, including loss through accident or inadvertence, and the act of an insane person in destroying property and life cannot be charged to his design or procurement, but is one of those unforeseen misfortunes or risks which it is the purpose of the policy to protect against, and one that is contemplated by the contract. It therefore seems to be the rule that the fact that a loss under an insurance policy was occasioned by an insane insured or beneficiary, will be no defense to the attempted enforcement of liability of the insured under the policy, unless the policy expressly provides against it.[35] But an express provision in the policy, precluding a recovery for injury received by the insured while insane, will operate as a bar to injuries so received.[36]

§ 378. Injury by insane third parties as accident

Yet another phase is presented under the decisions with reference to injuries inflicted on the insured by third persons, and which have been construed as "accidental," so as to allow a recovery under a policy insuring against accidental injury or death.[37] To avoid this interpretation, the insurers have added

[33] See § 438, ante.

[34] Karow v. New York Cont. Ins. Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17; Columbian Ins. Co. v. Lawrence, 10 Pet. (35 U. S.) 507, 9 L. Ed. 512; St. Louis Ins. Co. v. Glasgow, 8 Mo. 713, 41 Am. Dec. 661; Gates v. Madison County Mut. Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360.

[35] Holdom v. Ancient Order of United Workmen, 159 Ill. 619, 43 N. E. 772.

[36] Blunt v. Fidelity & Casualty Co., 145 Cal. 268, 78 P. 729, 67 L. R. A. 793, 104 Am. St. Rep. 34.

[37] Employers' Indemnity Corporation v. Grant, 271 F. 136, 20 A. L. R. 1118.

to such policies a clause providing that it will not apply where the injury causing the death or injury was from "intentional injury inflicted by the insured or any other party." [38] But in this form the clause has been held to apply only to injuries inflicted by sane and sober persons, on the ground that the injury could not be "intentional" where the person inflicting the injury was insane or intoxicated, as intention presupposes the ability to foresee and purpose the consequence of the act, all of which would be impossible for a person without reasoning mind.[39] Where the person inflicting the injury is insane, the disordered mind would be considered the proximate cause of the injury; and such cause of the act inflicting the injury, viz., the deranged mind, being beyond the control of human agency, the act itself could not be considered as intentional, and would not avoid the policy,[40] unless the act of the insane person was provoked by the insured, as where he started a fight with him,[41] or where recovery is defeated by the express terms of the policy, providing that an intentional injury shall preclude a recovery on such policy, whether the person inflicting the injury was sane or insane.[42]

[38] Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 8 S. Ct. 1360, 32 L. Ed. 308; Continental Casualty Co. v. Morris, 46 Tex. Civ. App. 394, 102 S. W. 773; Richards v. Travelers' Ins. Co. 89 Cal. 170, 26 P. 762, 23 Am. St. Rep. 455; Travelers' Ins. Co. v. McCarthy, 15 Colo. 351, 25 P. 713, 11 L. R. A. 297, 22 Am. St. Rep. 410; Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; Orr v. Travelers' Ins. Co., 120 Ala. 647, 24 So. 997; De Graw v. National Acc. Soc., 51 Hun, 142, 4 N. Y. S. 912.

[39] Travelers' Ins. Co. v. Houston, 3 Willson, Civ. Cas. Ct. App., § 429; Berger v. Pacific Mut. Life Ins. Co. of California, 88 F. 241.

[40] Corley v. Travelers' Protective Ass'n, 105 F. 854, 46 C. C. A. 278; Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 P. 856, 36 P. 813; Phœnix Accident & Sick Ben. Ass'n v. Stiver, 42 Ind. App. 636, 84 N. E. 772.

[41] Gresham v. Equitable Acc. Ins. Co., 87 Ga. 497, 13 S. E. 752, 13 L. R. A. 838, 27 Am. St. Rep. 263.

[42] Gaynor v. Travelers' Ins. Co., 12 Ga. App. 601, 77 S. E. 1072.

§ 379. As excusing untrue answers

The question of just what effect the insanity of the insured will have upon the effect to be given untrue answers to questions propounded in connection with the application for an insurance policy is not easily answered, because of the absence of definite adjudication upon the subject, and the rule with reference thereto must be found largely by analogy. Where such answer amounts to a mere representation, not material to the risk insured against, it is likely that insanity will excuse a false or inaccurate answer, since the questions of intent and good faith enter very largely into the force to be given thereto.[43] But where the question contained in such answers amounts to warranties or conditions material to the risk insured against, it is probable that the insanity of the insured will not excuse untrue or inaccurate answers, inasmuch as the intention of the parties is an immaterial matter.[44] Where a person takes out a policy of insurance while sane, his subsequent failure to comply with the warranties and conditions thereof will not be excused by his insanity at the time of such breach, since the contract is founded

[43] Globe Mut. Life Ins. Ass'n v. Wagner, 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. Rep. 169; Massachusetts Mut. Life Ins. Co. v. Crenshaw, 195 Ala. 263, 70 So. 768; Ætna Life Ins. Co. v. Rehlaender, 89 Neb. 284, 94 N. W. 129, 4 Ann. Cas. 251; American Nat. Ins. Co. v. Anderson (Tex. Civ. App.) 179 S. W. 66; Chadwick v. Beneficial Life Ins. Co., 54 Utah, 443, 181 P. 448.

[44] Murphy v. National Travelers' Benefit Ass'n, 179 Iowa, 213, 161 N. W. 57, L. R. A. 1917C, 338; Johnson v. National Life Ins. Co., 123 Minn. 453, 144 N. W. 218, Ann. Cas. 1915A, 458; Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; Kansas Mut. Life Ins. v. Pinson, 94 Tex. 553, 63 S. W. 531; Buchannan v. Supreme Conclave Improved Order Heptasophs, 178 Pa. 465, 35 A. 873, 34 L. R. A. 436, 56 Am. St. Rep. 774; Murphy v. National Travelers' Benefit Ass'n, 179 Iowa, 213, 161 N. W. 57, L. R. A. 1917C, 338; Johnson v. National Life Ins. Co., 123 Minn. 453, 144 N. W. 218, Ann. Cas. 1915A, 458; Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; Kansas Mut. Life Ins. Co. v. Pinson, 94 Tex. 553, 63 S. W. 531.

upon a substantial compliance with the terms, and the intention and good faith of the parties does not enter into the matter.[45]

§ 380. As excusing payment of premiums

The insanity of the insured will not, it seems, excuse the failure to pay the premiums on an insurance policy,[46] or dues on a beneficial certificate,[47] as it is an act which can be performed by an incompetent, or by some one for him.[48] But the authorities suggest that the beneficiary is entitled to notice of the failure of the insane person to make the required payments of dues and assessments, when such insurer has notice of the incompetent's condition, inasmuch as such beneficiary has an interest in the policy, which he may claim the right to protect by bringing to the attention of the insurer his desire to do so.[49]

[45] Whiteside v. North American Acc. Ins. Co., 200 N. Y. 320, 93 N. E. 948, 35 L. R. A. (N. S.) 696; Pitts v. Hartford Life & Annuity Ins. Co., 66 Conn. 376, 34 A. 95, 50 Am. St. Rep. 96; Klein v. New York L. Ins. Co., 104 U. S. 88, 26 L. Ed. 662; Whiteside v. North American Acc. Ins. Co., 200 N. Y. 320, 93 N. E. 948, 35 L. R. A. (N. S.) 696; Pitts v. Hartford Life & Annuity Ins. Co., 66 Conn. 376, 34 A. 95, 50 Am. St. Rep. 96; Klein v. New York L. Ins. Co., 104 U. S. 88, 26 L. Ed. 662.

[46] Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543, 37 Am. Rep. 594; New York Life Ins. Co. v. Alexander, 122 Miss. 813, 85 So. 93, 15 A. L. R. 314; Klein v. New York L. Ins. Co., 104 U. S. 88, 26 L. Ed. 662.

[47] Sheridan v. Modern Woodmen of America, 44 Wash. 230, 87 P. 127, 7 L. R. A. (N. S.) 973, 120 Am. St. Rep. 987; McCann v. Supreme Conclave, Improved Order of Heptasophs, 119 Md. 655, 87 A. 383, 46 L. R. A. (N. S.) 537.

[48] New York Life Ins. Co. v. Alexander, 122 Miss. 813, 85 So. 93, 15 A. L. R. 314; McCann v. Supreme Conclave, Improved Order of Heptasophs, 119 Md. 655, 87 A. 383, 46 L. R. A. (N. S.) 537; Bacon, Ben. Soc. § 384; Brotherhood of Railway Trainmen v. Dee, 101 Tex. 597, 111 S. W. 396.

[49] Buchannan v. Supreme Conclave, Improved Order Heptasophs, 178 Pa. 465, 35 A. 873, 34 L. R. A. 436, 56 Am. St. Rep. 774.

§ 381. Joint obligations

Inasmuch as the effect of insanity extends only to the person affected by it with reference to extinguishing or modifying obligations, a sane joint obligor is not released on an obligation by reason of the insanity of his co-obligor.[50] This is true, even where the insane person is principal on the obligation, and the other is but a surety, thus forming an exception to the general rule that the release of the principal will release the sureties.[51] It seems to be assumed in such case that the sureties, as close friends of the non compos, must have known of his disability, and agreed to pay the obligation, if the non compos exercised his right of disaffirmance and refused to do so. But this will not hold true, where there is any want of good faith on the part of the payee or obligee.[52] For example, if the obligee, knowing the insane condition of the principal, induced the surety to become bound while concealing from him the insanity of the principal, the surety could not be equitably held as such.[53]

§ 382. Implied contracts

Generally speaking, the rules governing the obligation of the non compos with reference to implied contracts differ materially from those governing express contracts. In this connection, we refer to that class of obligations which are implied in law and not in fact. The last of these classes—i. e., that implied in fact—is said to be implied from a person's conduct; and since an insane person should no more be held responsible for his conduct in creating a contractual obligation than he should be bound by his expression in word or writing, there is no reason why the ordinary rules governing the express obligation of the non compos should not apply to this last class of implied obligations, as

[50] Lee v. Yandell, 69 Tex. 34, 6 S. W. 665.
[51] Pom. Eq. Jur. § 946.
[52] Pom. Eq. Jur. § 946.
[53] Pom. Eq. Jur. § 946; Lee v. Yandell, 69 Tex. 34, 6 S. W. 665.

well as to express contracts. But in the former class—i. e., obligations implied by law—an entirely different principle governs. Here the assent of the non compos has nothing to do with creating the obligation, which rests entirely upon the operation of the statute or rule of law creating it, and there is no legal reason why it should not apply to insane persons with practically the same force as it does to normal persons.

§ 383. Constructive implied contracts

There is a class of obligations under this head which some of the authorities speak of as *quasi* or *constructive* implied contracts,[54] and which arise out of implied trust relations. For example, where one obtains money or property of another by mistake, he is under the implied obligation to return it, or to refund its value.[55] As expressed by Mr. Justice Field, "In such case the party makes no promise on the subject; but the law, 'consulting the interests of morality,' implies one," [56] and the consent or nonconsent of the person charged does not enter into consideration. This being true, it follows that the inability of the non compos to consent to the imposing of the liability will be no reason for avoiding the obligation, which is imposed in the interest of justice independent of such consent, and he will, generally, be held liable.[57]

§ 384. Obligations to family and dependents

Another class of obligations which comes under the head of implied obligations are those arising out of the ordinary neces-

54 6 R. C. L. 588; 13 C. J. 244.

55 Argenti v. City of San Francisco, 16 Cal. 282; Maine, Ancient Law, 344.

56 Pacific Mail S. S. Co. v. Joliffe, 69 U. S. (2 Wall.) 457, 17 L. Ed. 807.

57 Ashley v. Holman, 25 S. C. 394, 1 S. E. 13, 60 Am. Rep. 512; Ballard v. McKenna, 4 Rich. Eq. (S. C.) 358; Smith's Committee v. Forsythe, 90 S. W. 1075, 28 Ky. Law Rep. 1034; Usner v. Glass, 28 Pa. Dist. R. 306.

sity which rests upon one to provide for his family. This is one of the most primitive obligations imposed upon the individual, and arises out of the basic principles of society itself. It often happens that the non compos is one who would ordinarily be charged with the care and support of a family. His ability to supply their wants through his own earning powers is usually ended with the loss of reason, but not infrequently he is possessed of an estate which will supply the needed support. It then becomes a rather important question as to how far this estate will be charged with the care and support of the relatives who may or may not be a part of his immediate family.

§ 385. Support of immediate family

Ordinarily, insanity does not relieve a person of the obligations imposed upon him by nature and society. Though his incompetency may unfit him to personally care for those dependent upon him, yet the obligation remains, as far as he is able to meet it. A deplorable condition might exist, if a well-to-do man, when stricken with insanity, were relieved of all further obligation to his family, his wife to be left penniless, and his children remain without means of subsistence or education. Therefore, as a matter of common justice, as well as public policy, such an obligation existing during health is held unimpaired in principle after insanity; and where the estate of the non compos is more than sufficient to care for his necessities, the surplus, or such portion as necessary, will be used to meet the needs of his family.[58] But as the non compos, on account of his want of reason, is even more helpless than that of his family can well be, there must be sufficient estate to meet his wants before the other members of his family can be taken into consideration.[59]

[58] In re Cotton, 2 Mer. 100; Shelford on Lunacy, 156, 160.

[59] Matter of Kernochan, 84 Misc. Rep. 568, 146 N. Y. S. 1026; Decennial and Other Key-Number Digests, tit. Insane Persons, ⇐⇒64.

§ 386. Relations included in rule

Just what relations will be considered members of his family, so far as to entitle them to such support from a non compos, is somewhat of a matter of dispute in some instances. That the lawful wife and children will be so considered goes without dispute. The same is likely true of the husband, where from local laws or from physical infirmity he is entitled to support from the wife's estate. The rule is not so clear as to illegitimate children, but the tendency seems to be to extend the rule to cover them,[60] and this would seem to be the better rule. One is morally, and usually legally, bound to support the children he brings into the world, whether they are born in lawful wedlock or not; and, as a matter of public policy, society has a right to insist that their support be not thrown on her. Adopted children, having the same legal status in the family as natural-born children, are as a general rule entitled to the same support in this respect as children born into the family;[61] and the rule has been extended to cover stepchildren, where they were considered members of the family, and not objectionable to the insane person.[62]

Whether the mother of an insane person's illegitimate children may receive support out of his estate is a matter very much in dispute; and the general rule would seem to ordinarily exclude her from such claim. However, this strict rule has been relaxed under certain conditions, and the tendency has been to allow her support where she had, to any reasonable extent, fulfilled the office of wife, although not a lawful one,[63] and has a moral claim to recognition.

Since the moral obligations rest on the child to care for the

60 Ex parte Hancock, 5 Russ. 154, 29 Rev. Rep. 16, 5 Eng. Ch. 154, 38 Eng. Reprint, 985; Appeal of Halsey, 120 Pa. 209, 13 A. 934.

61 Matter of Heeney, 2 Barb. Ch. (N. Y.) 326.

62 Matter of Willoughby, 11 Paige (N. Y.) 257.

63 Stuckey v. Mathes, 24 Hun (N. Y.) 461; Appeal of Halsey, 120 Pa. 209, 13 A. 934.

parent, who is no longer able to care for him or her self, the estate of an insane person may be charged with the reasonable support of such parent, provided, of course, there is sufficient left, after supplying the needs of an insane person himself. For example, it is held that a mother, who lived with her son, was entitled to support out of his estate after he became insane,[64] she being dependent on him for such support.

§ 387. Limitations to rule

But the rule charging the estate of the insane person with the support of his children is not without limitations. Since the common law imposes no duty on a parent to support an adult child, fully capable of supporting itself, an intention to do so will not be implied to the insane parent.[65] In line with this rule, it has been held that amounts paid over to such adult children in health will be considered as having been intended as advances, rather than allowances for support, and that adult children, receiving the same, will be required to account for the same upon the final distribution of the estate.[66] So far has this rule been carried in some of the states that adult children, capable of contracting and providing for themselves, will not be allowed to look to the estate for reimbursement for expenses ordinarily chargeable to the estate, but which the child has for the time taken upon himself. For example, it has been held that an adult son may not look to the estate of the insane parent for reimbursement for sums advanced or debts contracted for the support of the dependent members of the insane's family.[67] We would suggest, however, that this should be limited to debts which the son might be himself morally obligated for, and would

[64] Ex parte Phillips, 130 Miss. 682, 94 So. 840.

[65] Citizens' State Bank of Trenton v. Shanklin, 174 Mo. App. 639, 161 S. W. 341.

[66] Matter of Willoughby, 11 Paige (N. Y.) 257; Ex parte Fowler, 6 Jur. 431.

[67] Wilcox v. Parker, 23 Ill. App. 429.

not extend to those matters for which the parent is ordinarily obligated rather than the son.

§ 388. Collateral relations

The rule which requires the estate of the insane person to contribute to the support of immediate and blood relations, such as the wife, husband, children, grandchildren, or parents, may be extended to take in the collateral relations as well, such as brothers and sisters, and even more remote relations, where by reason of their position they are dependent upon him, or where by reason of their particular circumstances they have a moral right to look to him for support.[68] As there is usually no actual obligation as a basis for the rule, it is based on the idea that the non compos, if in health, would make such provision, and that his guardian or committee should carry out such desire, which was evidenced by words and conduct during such person's sanity;[69] and where it appears that the non compos, if in his right mind, would not himself make such contribution, the rule will not apply.[70] It has been rightly said that great care and caution should be exercised in charging the insane person's estate with allowances to persons for whom the non compos is not legally bound to provide,[71] and that the practice of the rule should be limited rather than extended.[72] Subject to these limitations, the courts have approved allowances made from the estate of the insane to brothers and sisters of the non compos,[73] and to those

[68] Ex parte Whitebread, 2 Mer. 99; In re Cotton, 2 Mer. 100; In re Heeney, 2 Barb. Ch. (N. Y.) 326; Appeal of Elwyn, 67 Pa. 367.

[69] Potter v. Berry, 53 N. J. Eq. 151, 32 A. 259, 34 L. R. A. 297, 51 Am. St. Rep. 626; Binney v. Rhode Island Hospital Trust Co., 43 R. I. 222, 110 A. 615.

[70] Stephens v. Marshall, 23 Hun (N. Y.) 642; Matter of Heeney, 2 Barb. Ch. (N. Y.) 326.

[71] Ex parte Whitbread, 2 Mer. 99, 35 Reprint, 878; Binney v. Rhode Island Hospital Trust Co., 43 R. I. 222, 110 A. 615.

[72] In re Evans, 21 Ch. Div. 297.

[73] Ex parte Whitbread, 2 Mer. 99, 35 Reprint, 878.

of the half as well as whole blood,[74] nephews and nieces,[75] and even to cousins;[76] but the courts have refused to extend these allowances to illegitimate children of such collateral relations,[77] and would likely refuse to extend it to the mother of such children.

§ 389. Subject to claims of creditors

However, in this connection, it is held that the claim to relations to support out of the estate of the non compos would be subject to the claims of creditors of such estate, except as to amounts exempted to the family by state statutes. As to portions of the estate exempted to the family by statute, the claims of such relatives will be paramount to those of the creditors of the estate.[78] This exception to the rule seems to be based upon the idea that a person must be just to his creditors before he is generous to his relatives, and the law will imply such an intention to him.

§ 390. Other applications of rule

There has been a tendency in some jurisdictions to extend the above rule, on the theory that, as the courts, through their committees, are keepers of the conscience of the non compos, they will not only carry out the obligations and intentions of the non compos, but will do that which in good conscience he would be expected to do, were he in full possession of his senses. The working out of this theory is seen in the allowance of support to illegitimate children of the non compos, noted supra, and the allowances made to indigent collateral relations, such as cousins, nieces, nephews, etc., where the estate of the non compos is ample, and where he has shown an inclination to make such al-

[74] In re Farmers' Loan & Trust Co., 181 App. Div. 642, 168 N. Y. S. 952; Id., 225 N. Y. 666, 122 N. E. 880.

[75] In re Sparrow, 20 Ch. Div. 320; In re Blair, 18 Eng. Ch. 300, 40 Reprint, 390.

[76] In re Croft, 32 L. J. Ch. 481; In re Frost, L. R. 5 Ch. 699.

[77] Matter of Grove, 13 L. J. Ch. 262.

[78] German Nat. Bank v. Engeln's Committee, 77 Ky. (14 Bush) 708.

lowances during his competency,[79] and where, on the same principle, such persons are allowed to retain the possession and use of property which it was the evident intent of the non compos they should have the use of.[80] And this rule of law is not entirely limited in its practical operations to the relations of the non compos. Where the income of the estate is ample, the committee or guardian of such insane person has been allowed to extend aid to those whom the non compos, prior to his derangement, had taken under his care or had otherwise signified his intention to aid. For example, old personal servants, who have become infirm, have been allowed to become partakers of the bounty of the non compos,[81] and minors who have been taken into the family of the non compos during the period of his mental capacity, and cared for and educated up to the time of the protector's incapacity.[82] In such cases, unless a contrary intention appears on the part of the non compos, the court may direct that such dependent be provided for out of the estate until such time as such dependent can care for himself.

§ 391. Moral obligations of non compos

In some cases the courts have gone even further in their attempt to carry out the intentions of the insane person, formed before he lost his reason. Since the course of the unfortunate's life, with his attendant plans and ambitions, has been halted by

[79] In re Farmers' Loan & Trust Co., 181 App. Div. 642, 168 N. Y. S. 952; Id., 225 N. Y. 666, 122 N. E. 880; In re Croft, 32 L. J. Ch. (N. S.) 481; In re Whitbread, 2 Mer. 99, 35 Reprint, 878; In re Gilbert, 3 Abb. N. C. (N. Y.) 222; Binney v. Rhode Island Hospital Trust Co., 43 R. I. 222, 110 A. 615. Contra, In re Hybart, 119 N. C. 359, 25 S. E. 963.

[80] Appeal of Hambleton, 102 Pa. 50; In re Hybart, 119 N. C. 359, 25 S. E. 963; Potter v. Berry, 53 N. J. Eq. 151, 32 A. 259, 34 L. R. A. 297, 51 Am. St. Rep. 626.

[81] In re Carysfort, Cr. & Ph. 76, 41 Reprint, 418.

[82] Matter of Heeney, 2 Barb. Ch. (N. Y.) 326; In re Earl of Carysfort, 1 Craig & Ph. 76, 41 Eng. Reprint, 418; In re Willoughby, 11 Paige (N. Y.) 257.

the cloud of madness which has settled upon him, it is the policy of the courts to have his affairs to continue in the channels he would have desired, had he retained his reason, subject, of course, to due regard for his own support, that he may not in his helpless condition become a charge upon the public. With this idea in mind, the courts have often directed the use of the incompetent's estate for the carrying out of religious, benevolent, and similar purposes evidently in the mind of the non compos during his competency, as, for example, the customary contributions towards the support of the church he was in the habit of attending,[83] towards building churches and schools[84] in accordance with an intention evident while competent, etc. But it is said the estate should not be charged with such contributions for charities or benevolences, where the non compos was not in the habit of making such contributions during his competency.[85]

§ 392. Heirs apparent—Provision for

To further carry out the above idea, it is held that, where the non compos is hopelessly insane, without hope for recovery, the courts will recognize the rights of the heirs in his estate to the extent of making them an allowance out of such estate, as the size of the estate and the means and conditions of the parties will justify.[86] But an allowance will not be made for the purpose of paying the debts of such heirs.[87] Being insane, however hopeless, will not be equivalent to physical death, so as to authorize a distribution of the estate of a lunatic, as noted elsewhere supra,[88] but his material grasp upon his worldly posses-

[83] Matter of Reed, 18 Misc. Rep. 285, 41 N. Y. S. 156; In re Stickland, L. R. 6 Ch. 226, 24 L. T. (N. S.) 530, 19 Week. Rep. 515.

[84] In re Stickland, L. R. 6 Ch. 226, 24 L. T. (N. S.) 530, 19 Week. Rep. 515. See note to Potter v. Berry, 53 N. J. Eq. 151, 32 A. 259, 34 L. R. A. 297, 51 Am. St. Rep. 626.

[85] Matter of Heeney, 2 Barb. Ch. (N. Y.) 326; note, 34 L. R. A. 300.

[86] In re Willoughby, 11 Paige (N. Y.) 257; In re Blair, 1 Myl. & C. 300, 5 L. J. Ch. (N. S.) 150; In re Croft, 32 L. J. Ch. (N. S.) 481.

[87] Ex parte Linehan, 1 J. & L. 29.

[88] See § 241, supra.

sions has so far relaxed that he can no longer control them or divert them from those legally entitled to their ultimate enjoyment at his death, and there seems no reason why his heirs should not be allowed to relieve necessities out of that which is certain to be theirs in the near future. In line with this rule, it has been held that, where the terms of the local statutes permit it, the wife may claim her dower in the lands of an insane husband.[89]

§ 393. Obligations imposed by statute

A further form of implied contract is that imposed by a specific law or statute. As the obligation is imposed by the law, a legal fiction implies the consent of the individual, and it thereby becomes a fixed obligation. Of this nature are assessments imposed by law in the way of taxes, for municipal improvements, etc. As a general proposition, this class of implied contracts is binding upon the non compos, because the express assent of the individual is not necessary to their creation, and therefore the incapacity of the individual to give consent becomes immaterial to the creation of the obligation. It is, as a consequence, held that insanity does not affect a person's liability to pay taxes.[90] This is so far true that, under the clauses usually found in the state constitutions providing for uniform taxation, a statute which attempts to exempt from taxes the property of a non compos person is unconstitutional. The same is true of a statute which provides for the abatement of such taxes, as it would amount to the same thing in the end; i. e., it destroys the uniformity of taxation, by causing the rate on one piece of property to be less than that on another.[91] The reason given is that taxation is based on the relative ability of the taxpayer to contribute to the expense of the government, such ability depending upon the amount of property owned, and not on the mentality, and there would be

[89] Rannells v. Isgrigg, 99 Mo. 19, 12 S. W. 343.

[90] De Hatre v. Edmonds, 200 Mo. 246, 98 S. W. 744, 10 L. R. A. (N. S.) 86; Hennel v. Board of Com'rs of Vanderburgh County, 132 Ind. 32, 31 N. E. 462.

[91] State v. Armstrong, 17 Utah, 166, 53 P. 981, 41 L. R. A. 407.

no reason of public policy which would release the property of the non compos from its proportionate share of the burden. Of course, the right to levy a tax carries with it the attendant right to foreclose the lien as against the non compos; and the non compos and his guardian or committee would have the actual right of redemption within the statutory time, after a sale is made under the foreclosure.[92] The same rule would apply to special assessments for municipal, etc., improvements, where the proportionate costs of the improvements are assessed against the abutting property of the non compos, except, probably, where the right to make the assessments depends upon the consent of the property owner as a condition precedent to making the assessment. In such case, the assessment would fall, because of the inability of the non compos to give consent. Of the same general nature are those classes of contracts implied by the common law, rather than imposed by statute, and with reference to them the rule is much the same as discussed supra. Thus it is held that the insanity of a bailee will not release him from answering for the wrongful loss or destruction of property left in his care,[93] and that the insanity of an innkeeper will not relieve him of liability for loss of goods belonging to his guests.[94]

[92] Powell v. Smallwood, 48 W. Va. 298, 37 S. E. 551.
[93] Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349.
[94] Cross v. Andrews, Cro. Eliz. 622.

CHAPTER 11

LEGAL STATUS WITH REFERENCE TO BUSINESS RELATIONS

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§ 394. Business relations in general—Status as to

There are a number of business relations which, while they are in the first instance founded on contract, yet effect such a permanent change in the relations of the individuals involved that they almost amount to a status. Such instances are found in partnership, master and servant, principal and agent, marriage, etc. While entering into such relations first depended upon the consent of the individual members, yet, after the relations have been formed, the law implies new duties and obligations therefrom. Necessarily, therefore, rights arise independent of the express will of the individuals. Marriage is so far a status that it will be treated in a separate chapter; but some of the other relations will be examined in the following paragraphs.

§ 395. As to partnership

As the entering into the relation of partners is a matter of contract, requiring the consent of the individual members, it naturally follows that a non compos cannot bind himself to the formation of a partnership, because he has not the mind to con-

sent thereto. The matter would be governed by the rules governing the contractual relations of the insane person, considered elsewhere in this volume.[1]

§ 396. By subsequent insanity

But where the insanity of a member of a partnership occurs subsequent to the formation of the same, a different rule would apply. As the relation of the partners rests largely upon the implication of the rules of law governing the same, rather than the assent of the individuals, there is no reason why the insanity of one member should of itself work a dissolution of the partnership as in the case of the death of such member. Therefore the general rule is that the insanity of a member of a partnership will not ipso facto work a dissolution of the firm,[2] although there is some authority to the contrary.[3] But, as the relation is founded upon the mutual co-operation and aid of the competent members, and a partner who has lost his reason can hardly be expected to render the proper aid and support to his copartners, which the relation requires, the insanity of a member will furnish a valid excuse for the dissolution and winding up of the partnership by the other members;[4] and the same privilege would likely be accorded the non compos and his guardian or committee, where he is shown to be no longer capable of conducting the business, though it is held that such guardian or committee cannot bind the non compos in such a settlement, unless made under the direction of the proper court.[5]

[1] See ante, § 334 et seq.

[2] Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. Rep. 112; Jurgens v. Ittman, 47 La. 367, 16 So. 952; Story, Partnership, p. 425; Parsons, Partnership, p. 466.

[3] Isler v. Baker, 6 Humph. (Tenn.) 85.

[4] Raymond v. Vaughn, 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. Rep. 112.

[5] Story, Partnership, pp. 425, 428.

§ 397. As to agency, in general

As master and servant and principal and agent are governed by the same principles, they will be treated under the same heading, viz., agency.

Some of the rules which will govern in this respect are not very well established, because of the very few adjudicated cases on the subject; but, as a whole, the interests of the non compos, whether principal or agent, will be taken into consideration and the rules adopted are directed to safeguard his interests.

§ 398. Insanity of principal

It is fairly well settled, as a general rule, that an insane principal cannot be bound by the acts of an agent other than that of a regularly appointed guardian or committee, whether such agent is formally appointed by power of attorney[6] or is a mere volunteer or "next friend."[7] The reason is that an insane person should not be allowed to do indirectly what he cannot do directly.[8] Indeed, it is usually held that the insanity of the principal automatically terminates the relation, or, more properly speaking, perhaps, the power and authority of the agent to act.[9] The relation of principal and agent is founded upon the intelligent consent of the principal whose will passes out through, and is expressed by, the agent as a means or instrumentality; and when the power of intelligent consent ceases on the part of the principal,

[6] Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73; Plaster v. Rigney, 97 F. 16, 38 C. C. A. 25.

[7] Page v. Louisville & N. R. Co., 129 Ala. 232, 29 So. 676; Surles v. Pipkin, 69 N. C. 513.

[8] Perrine's Case, 41 N. J. Eq. 409, 5 A. 579; Davis v. Lane, 10 N. H. 156; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199.

[9] Renfro v. City of Waco (Tex. Civ. App.) 33 S. W. 766; Hartford v. McGillicuddy, 103 Me. 224, 68 A. 860, 16 L. R. A. (N. S.) 431, 12 Ann. Cas. 1083; Merritt v. Merritt, 27 App. Div. 208, 50 N. Y. S. 604; Davis v. Lane, 10 N. H. 156; Bunce v. Gallagher, 4 Fed. Cas. 606, No. 2,133, 5 Blatchf. 481; Wightman v. Wightman, 223 Mass. 398, 111 N. E. 881, 7 A. L. R. 1361.

the source of the agent's power is gone. While the power of the agent, as indicated, is suspended during the insanity of the principal, such power revives upon the principal recovering his reason; the cause for the suspension of such power having been removed, the suspension itself ceases. This is so far true that the acts of the agent, done during the suspension of the agent's powers by the temporary insanity of the principal, may be given full force by the assent of the principal, given after the recovery of his reason.[10]

But, where one is employed by another in connection with practicing a profession, the servant may continue the practice of the profession upon the principal becoming insane, using the office and tools of the profession without liability, except for the value of use of such tools, etc., provided he does not carry on in the principal's name.[11] The idea seems to be that such profession is a personal matter, founded upon the skill and integrity of such individual, and such servant would be on his own and not on his principal's work.

§ 399. Rights of third parties

Ordinarily, the foregoing is true, whether the principal has been adjudged insane or not; but, where the rights of third parties have intervened, a different rule will apply. When the non compos principal is not under guardianship or adjudged a lunatic, third parties, to whom the agent has been held out as such and who have innocently dealt with the agent and placed themselves in a position, where a denial of such agency would work a hardship on them, will be protected, even to the extent of recognizing a continuance of the agency.[12] Where, however, the non compos is under guardianship or has been adjudged insane, the rights of third parties will not be protected in their

[10] Davis v. Lane, 10 N. H. 156.

[11] Wightman v. Wightman, 223 Mass. 398, 111 N. E. 881, 7 A. L. R. 1361.

[12] Phelps v. Reinach, 38 La. Ann. 547; Hill's Ex'rs v. Day, 34 N. J. Eq. 150; Davis v. Lane, 10 N. H. 156.

dealing with the agent of such insane person, as every person is charged with notice of the principal's incapacity, and must deal with him or his agent at their peril.[13] But in this connection the policy of the courts has been to restrict, rather than to extend the principal of constructive notice of the principal's insanity on innocent third parties. In line with this policy, it has been held that a mere application to have one adjudged insane will not be construed to charge innocent third persons with notice;[14] nor will notice be imputed where the principal was merely adjudged to be afflicted with a type of insanity such as will limit his capacity to make a contract only, such as, for example, habitual drunkenness.[15]

§ 400. Subsequent insanity of principal

In line with the policy to protect those innocently dealing with an insane principal or master, it is held that, where an agent or servant is employed for a definite period, the subsequent insanity of the principal or master will not ordinarily operate to terminate the contract of employment.[16] Since the unfortunate derangement is without the fault of the agent or servant, he is entitled to the fruits of his contract. Also, it would seem that, when the agency is of the class known as an agency coupled with an interest, it will not be affected by the subsequent insanity of the principal.[17] The vested right of the agent cannot be affected.

[13] Bunce v. Gallagher, 4 Fed. Cas. 660, No. 2,133, 5 Blatchf. 481; Phelps v. Reinach, 38 La. Ann. 547.

[14] Gernon v. Dubois, 23 La. Ann. 26.

[15] Motley v. Head, 43 Vt. 633.

[16] Sands v. Potter, 165 Ill. 397, 46 N. E. 282, 56 Am. St. Rep. 253.

[17] Matthiessen & Weichers Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536; Davis v. Lane, 10 N. H. 156; Hill's Ex'rs v. Day, 34 N. J. Eq. 150.

§ 401. As to insane agent

Because of the limited number of cases on the subject, it is yet somewhat unsettled as to just what effect the insanity of the agent will have on his agency. It is said by some authorities that a mentally incompetent person is incapable of becoming an agent in the first place, and that, where the agency has commenced during competency and the agent has subsequently become insane, the insanity will terminate the relation.[18] However, we think this statement of the rule is much too broad. A better statement of the rule is that, while a relative smaller degree of sanity is required of one acting under the direction of another [19] —i. e., as agent or servant—yet at least some degree of intelligence is required;[20] and the required degree of intelligence, as well as the effect of insanity itself, is very largely controlled by the relations of the parties involved, the principles of estoppel coming in to modify, and in some cases to control, the question of insanity vel non.

§ 402. As between principal (or master) and agent (or servant)

As between the principal or master and a non compos agent or servant, the usual rule governing the relations of normal and insane persons will ordinarily govern. The insane agent is bound in no way by such contract and incurs no liability under it.[21] On the other hand, the principal will not be allowed to take advantage of the agent's incompetency, and will be bound to the agent, or his guardian, on the contract of agency, except where from the very nature of the thing it would be contrary to equity

[18] Hartford v. McGillicuddy, 103 Me. 224, 68 A. 860, 16 L. R. A. (N. S.) 431, 12 Ann. Cas. 1083; Story, Agency, § 487.

[19] Cobb v. Judge of Superior Court, 43 Mich. 289, 5 N. W. 309; Lyon v. Kent, 45 Ala. 656.

[20] Lyon v. Kent, 45 Ala. 656; Rowe v. Rand, 111 Ind. 206, 12 N. E. 377.

[21] 31 Cyc. 1212.

or public policy to attempt to hold him. For example, while the principal will be bound for an amount earned, obligations incurred, or sums expended by the insane agent, yet it would hardly be equitable or public policy to force a principal or master to keep in his service an agent or servant who, by reason of his mental incapacity, was incapable of rendering efficient service, or who might even be a danger to those with whom he is brought into contact, and who might charge his principal or master with additional liability through his irresponsible acts. The contract on the part of the agent or servant necessarily implies some capacity to render with reasonable efficiency the services contemplated at the time of employment; and if, by reason of mental deficiency, this cannot be done, the employer is relieved of his obligation to retain the employee,[22] because the employee has involuntarily defaulted on his contract.

§ 403. Rights of third parties

As between the principal and agent, on one hand, and third parties, on the other, a stricter rule will be observed. So far as the agent is concerned, his incompetency will shelter him from all liability, where under the usual rules of law he would be liable to third parties if he were normal. The rule as to the principal is different. He cannot take advantage of the incompetency of an agent he has employed as a shelter to hide behind,[23] and will be estopped from denying liability for the acts of such agent, done within the apparent scope of the agent's authority, so long as the third party has acted in good faith in the matter.[24]

[22] Lyon v. Pollard, 20 Wall. 403, 22 L. Ed. 361.

[23] Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128.

[24] King v. Bellord, 1 Hen. & M. 343, 32 L. J. Ch. 646, 8 L. T. Rep. 633, 2 N. P. Rep. 442, 11 Wkly. Rep. 900, 71 Eng. Reprint, 149; Foreman v. Great Western R. Co., 38 L. T. Rep. (N. S.) 851.

§ 404. Objection by third persons

Much the same general rule applies to the third person. It has been held that he will not in any event be allowed to object to the incompetency of the agent.[25] The reason for such holding probably being that, if the principal saw fit to intrust his interests to such hands, it was not for the third person to complain. However, we think such a holding is likely too broad; and, while the third person will not be heard to object so long as his interests and rights are in no way affected by the incompetency of the agent, yet he will be heard on the matter where his rights are materially jeopardized. Where the common interests of the principal and third party required that the matters between them be handled with certain skill and discretion, the mental condition of the person handling such matters might become a very vital consideration in securing desired results.

§ 405. As affects liability of industrial insurer

The courts are not entirely in accord with reference to the liability under workman's compensation insurance, where the employee was mentally incompetent at the time of the accident complained of. The right to compensation is such cases is usually made to turn on the question of whether the injury in question arose out of the employment, or was merely the result of the mental affection. While the language of some of the cases may not be wholly in accord with it, we think that it might be stated as the general rule that, where the accident resulted from the fact of the employment, and the fact that the injured party was so employed as to make it possible for the accident to have occurred, it will considered that the employment contributed to the injury, and that it arose out of the employment, notwithstanding that it was aggravated or contributed to by the mental

[25] Cameron v. Ward, 22 Ga. 168.

condition of the employee;[26] but where the accident did not arise out of the conditions incident to the employment, but was due to the mental condition of the employee, it cannot be said to have arisen out of the employment, and no liability will result, notwithstanding the fact that the employee may be engaged in the employment at the time.[27] For example, where, because of an epileptic fit, a workman fell into hot cinders, which he was removing from a furnace, it was held he could recover, because the hot cinders contributed to his death.[28] And where a lick by a timber received while at work combined with excessive drinking to produce death, a recovery was allowed for a similar reason.[29] But where an epileptic fell from a scaffold, not dangerous, because but a few feet from the ground, the accident was held not to have arisen out of the employment, and a recovery was denied, because the employment did not contribute to it;[30] and a fall, because of epilepsy, against hot pipes at a place other than that where an employee regularly worked, was held not to have arisen out of the employment, as the employment did not contribute to it.[31] The distinction between the Rockford Hotel Co.

[26] Rockford Hotel Co. v. Industrial Commission, 300 Ill. 87, 132 N. E. 759, 19 A. L. R. 80; Ramlow v. Moon Lake Ice Co., 192 Mich. 505, 158 N. W. 1027, L. R. A. 1916F, 955; Sullivan v. Industrial Engineering Co., 173 App. Div. 65, 158 N. Y. S. 970.

[27] Cox v. Kansas City Refining Co., 108 Kan. 320, 195 P. 863, 19 A. L. R. 90; Milliken's Case, 216 Mass. 293, 103 N. E. 898, L. R. A. 1916A, 337, 4 N. C. C. A. 512; Brooker v. Industrial Accident Commission, 176 Cal. 275, 168 P. 126, L. R. A. 1918F, 878; Kelly v. Nichols, 199 App. Div. 870, 191 N. Y. S. 445; Madey v. Swift & Co., 101 Kan. 771, 168 P. 1105; C. E. Peterson & Co. v. Industrial Board of Illinois, 281 Ill. 326, 117 N. E. 1033.

[28] Rockford Hotel Co. v. Industrial Commission, 300 Ill. 87, 132 N. E. 759, 19 A. L. R. 80.

[29] Sullivan v. Industrial Engineering Co., 173 App. Div. 65, 158 N. Y. S. 970.

[30] Van Gorder v. Packard Motorcar Co., 195 Mich. 588, 162 N. W. 107, L. R. A. 1917E, 522.

[31] Cox v. Kansas City Refining Co., 108 Kan. 320, 195 P. 863, 19 A. L. R. 90.

Case and the Cox Case seems to be that the hot cinders in the former case were present at and a part of the risk of the employee's post of duty, while in the latter case the hot pipes were remote, and not a part of the risk of the post of duty—i. e., the other injury was contributed to by risk incident to the employment in one case and not in the other.

CHAPTER 12

LEGAL STATUS WITH REFERENCE TO MARRIAGE

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§ 406. Effect on inception of marriage, in general

At common law, a person without reason was held to be incapable of contracting a valid marriage. The reason for the

rule was that, since marriage was a civil contract, in the consummation of which the minds of the parties must meet, and there could be no meeting of the minds where one of the contracting parties was insane, there could, consequently, be no contract and consequent marriage.[1] The logical conclusion of such a rule was that the attempted marriage stood as if it had never been consummated. This rule has been adopted by the courts of some of the American states, where it is held that such a marriage is wholly void, and no decree or judgment is necessary to restore the parties, especially the insane party, to their former condition.[2]

§ 407. The American rule

In a majority of the states, the common-law rule, declaring the marriage of the non compos person to be void, has been somewhat modified, and the general rule seems to be that, where one of the contracting parties is insane at the time of the marriage, such marriage is void so far as it affects the civil and property rights of the contracting parties, and may be attacked collaterally in any judicial proceeding in which its force is brought into question. But this rule is not extended with the same strictness to the family relations themselves. While there are many decisions which characterize such marriages as "absolutely void" and "void ab initio," yet few, if any, of the courts will bastardize the issue of these marriages, and with few exceptions, all courts recognize that some character of legal proceedings should be had through the courts looking to the establishment of the illegality of the marriage. In short, the courts recognize that the insanity of either party to a marriage will only avoid the same to the extent of authorizing the setting aside of such marriage in any competent legal proceeding, either direct or collateral; but

[1] Bl. Comm. pp. 3438, 3439.

[2] Bell v. Bennett, 73 Ga. 784; Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665; Unity v. Belgrade, 76 Me. 419; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Rawdon v. Rawdon, 28 Ala. 565.

any recognition of the existence of such marriage is limited to the family relations, and the spouse of the non compos is not recognized as acquiring any property or civil rights by reason of the marriage, such as the right of control over the insane person's property, dower rights in such property, or even rights of administration, guardianship, or control of the person of the non compos.[3] The attitude of the American courts is emphasized by the rule that, while the recognized formal decree of divorce is not strictly necessary to restore the non compos spouse to his or her property rights,[4] yet they are inclined to require that the nullity of such marriage should properly be recognized by a decree or judgment of a court of competent jurisdiction.[5] There are decisions which seemingly decline to follow the strict requirements of the common-law rule, and to hold that the insanity of a party to a marriage will render it voidable only at the election of the insane person, and good until so avoided;[6] but the general rule is as we have indicated above. However, the courts will seize on any reasonable grounds, such as where such marriage was subsequently consented to by the insane person during a lucid interval,[7] to validate the marriage, unless to do so would be to the injury of the incompetent spouse. This is denied in

[3] Kitzman v. Werner, 167 Wis. 308, 166 N. W. 789; Jenkins v. Jenkins, 2 Dana (Ky.) 102, 26 Am. Dec. 437; Winslow v. Troy, 97 Me. 130, 53 A. 1008; Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230; Holland v. Riggs, 53 Tex. Civ. App. 367, 116 S. W 167; Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 263, 63 Am. St. Rep. 211; 34 Century Digest, tit. Marriage, § 25.

[4] Ex parte Turing, 1 Ves. & B. 140, 35 Eng. Reprint, 55; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Rawden v. Rawden, 28 Ala. 565.

[5] Williamson v. Williams, 56 N. C. 446; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343.

[6] In re Gregorson, 160 Cal. 21, 116 P. 60, L. R. A. 1916C, 697, Ann. Cas. 1912D, 1124; Cole v. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275; Prine v. Prine, 36 Fla. 418, 18 So. 781, 34 L. R. A. 87.

[7] Gross v. Gross, 96 Mo. App. 486, 70 S. W. 393.

some jurisdictions, where the courts hold that, since the contract of marriage was void in the first instance, it could not be revived by subsequent consent.[8] But we think that such a rule would be opposed to public policy, which approves the validation of marriage and the legitimatizing of issue; and where the strict rule of the common law is insisted on, the answer is likely found in those decisions which hold that such subsequent consent will at least be a new contract, or common-law marriage, and will estop the other party from denying it.[9]

§ 408. Conflict of law, as affected by

As there is a diversity of opinion among the courts of the American states as to the exact effect of insanity of one spouse at the time of the marriage, it sometimes becomes important to know which rule will control, where the parties have married in one state and moved to another state, where the rule differs from that of the state where the marriage was actually performed. Under the full faith and credit clause of the federal Constitution, the official acts of one state are given full credit in another state; and as a matter of public policy it is generally held that a marriage which is valid where performed is valid everywhere, and vice versa.[10] This follows very closely the rule of lex loci contractus, a marriage being based on the marriage contract of the parties. Therefore it is evident that the validity of a marriage will be measured by the rules of law in force where such marriage was performed.

[8] Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 61 Am. St. Rep. 665, 40 L. R. A. 737; Ward v. Dulaney, 23 Miss. 410; Wiley v. Wiley, 69 Ind. App. 431, 123 N. E. 25.

[9] Cole v. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275; Gross v. Gross, 96 Mo. App. 486, 70 S. W. 393; Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343; Prine v. Prine, 36 Fla. 418, 18 So. 781, 34 L. R. A. 87.

[10] Jackson v. Jackson, 82 Md. 17, 33 A. 318, 34 L. R. A. 773; Lyon v. Lyon, 230 Ill. 366, 82 N. E. 850, 13 L. R. A. (N. S.) 996, 12 Ann. Cas. 25; Hastings v. Douglass, 249 F. 379; Patterson v. Gaines, 6 How.

§ 409. Time of existence

But the insanity must exist at the time of the marriage, in order to affect the marriage. Therefore, where the marriage occurred during a lucid interval,[11] or where the person became insane after the marriage, though he may have been slightly affected at the time the marriage was performed, the marriage will not be affected by the insanity, although it might give grounds for divorce, where the other party was ignorant of the disability at the time and acted in all good faith.[12] Conversely, if the insanity actually existed at the time of the marriage, it makes no difference how sane the person may have been immediately before and immediately after the marriage. It is a question of the state of the mind at the time the ceremony actually took place.[13] Such subsequent recovery would only be material on the question of a confirmation of the marriage on the part of the insane person, where that question is raised by the facts.

§ 410. Extent of insanity

Just what degree of insanity will be necessary to avoid a marriage is somewhat of a nice question, but the cases are generally agreed that something more than a mere mental weakness is required, unless it amounts to a derangement with reference to the subject of marriage.[14] Mere weakness of intellect, dullness of understanding, coupled with deafness and dumbness, great eccentricity of conduct, or a mind subject to some vice, or un-

550, 12 L. Ed. 553; Kitzman v. Werner, 167 Wis. 308, 166 N. W. 789, and cases cited. See 7 A. L. R. 1506.

[11] Ash's Case, 2 Freem. Ch. 259; Browning v. Reane, 2 Phillim. 69; Rawdon v. Rawdon, 28 Ala. 565.

[12] Forman v. Forman, 53 N. Y. St. Rep. 639, 24 N. Y. S. 917; Smith v. Smith, 47 Miss. 211; Keyes v. Keyes, 22 N. H. 553; Barber v. Barber, 74 Iowa, 301, 37 N. W. 381.

[13] Parker v. Parker, 2 Lee, Eccl. 382; Smith v. Smith, 47 Miss. 211.

[14] Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211.

controllable impulse or propensity, will not of itself be sufficient.[15] In this connection, it has been held that the mere proof of insanity, without showing the degree thereof, will not of itself be sufficient to satisfy the requirements.[16]

§ 411. Test of capacity to marry

In measuring the capacity of a person to enter the marriage relation, the courts ordinarily use one of two tests. The first of these has its inception in the idea that marriage is a contractual relation. It therefore measures the capacity of an alleged insane person, seeking to enter the marriage relation, by the test of whether or not such person has sufficient understanding to enter into the marriage contract. In arriving at an answer under this rule, it is competent to show that the alleged non compos is capable or incapable of making an ordinary contract.[17] The objection to this test is that a person may be capable of entering into an ordinary contract, and yet be insane on the subject of marriage itself.[18] The second test is based on a consideration of whether or not the individual has the mental capacity to understand and appreciate the nature of the marriage relation and the duties and obligations thereof. This looks at marriage as a status, and requires that the individual understand that the nature of the step he is taking is changing his status from that of a single person to that of a member of a marital union, and that he recognizes and appreciates the obligations he is about to as-

[15] Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. Rep. 559; Ward v. Dulaney, 23 Miss. 410; Adams v. Scott, 93 Neb. 537, 141 N. W. 148; Baughman v. Baughman, 32 Kan. 538, 4 P. 1003.

[16] Concord v. Rumney, 45 N. H. 423.

[17] Bell v. Bennett, 73 Ga. 784; Cole v. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275; Kern v. Kern, 51 N. J. Eq. 574, 26 A. 837; Ward v. Dulaney, 23 Miss. 410; Inhabitants of Atkinson v. Inhabitants of Medford, 46 Me. 510; Nonnemacher v. Nonnemacher, 159 Pa. 634, 28 A. 439; Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445.

[18] Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211.

sume with reference thereto.[19] However, these tests are not exclusive, but may, and frequently are, used in conjunction, in determining whether a person has sufficient mental capacity to enter the marriage relation.[20] In this connection it has been held that a prior judgment of lunacy, extending back to the time of the marriage, is prima facie, but not exclusive, proof that the party was insane at the time of the marriage.[21]

§ 412. Insanity as to subject

As indicated above, in order for a marriage to be declared void on the ground of the insanity of one of the parties thereto, the party in question must not only be insane, but must be insane with reference to the effect, duties, and obligations of the marriage itself. For example, the fact that a person is affected with kleptomania, or a morbid propensity to steal, will not affect his capacity to contract a valid marriage, as his insanity affects him in an entirely different direction.[22] But a person who is otherwise rational, except that he is under an insane delusion that he is being urged into a marriage by spirits through a medium, has been held to be sufficiently insane to avoid a marriage made under the urging of such delusions.[23] Also in this connection it has been held that, where a party was so intoxicated at the time he entered into a marriage as to be incapable of understanding

[19] Ward v. Dulaney, 23 Miss. 410; Foster v. Means, Speers, Eq. (S. C.) 569, 42 Am. Dec. 332; Roether v. Roether, 180 Wis. 24, 191 N. W. 576, 28 A. L. R. 631; Prine v. Prine, 36 Fla. 418, 18 So. 781, 34 L. R. A. 87; Dumphy v. Dumphy, 161 Cal. 380, 119 P. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230.

[20] See note 3, supra; 40 L. R. A. 737, note.

[21] Keys v. Norris, 6 Rich. Eq. (S. C.) 388; Payne v. Burdette, 84 Mo. App. 332; McCleary v. Barcalow, 3 O. C. D. 547, 6 Ohio Cir. Ct. R. 481; Banker v. Banker, 63 N. Y. 409.

[22] Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. Rep. 559.

[23] Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211.

and appreciating what he was doing, he was non compos sufficiently to render the marriage so entered into void, because to all intents and purposes he had lost his mind for the time being.[24] Mere temporary insanity will be sufficient, if it is shown that the marriage took place during the period when the person was insane; but this fact must be shown. If the marriage took place during a lucid interval, it will ordinarily be valid.[25]

§ 413. As affected by fraud

A much more lenient rule will be allowed in the proof of insanity, where it appeared that fraud was present at the time. Since a person whose mind is merely weak can be grossly and easily imposed upon, and led into doing an act against their judgment and will, a less degree of insanity will justify the avoidance of a marriage, where it is coupled with proof of fraud.[26] This partakes very much of the nature of the rule applicable to cases of undue influence, where a weak intellect is controlled by a stronger, to the detriment of the former. Moreover, here is an exception to the general rule that insanity of one spouse cannot be taken advantage of by the other spouse to avoid the marriage. Where, by reason of fraud, the insanity is concealed from the sane person, it will avoid the marriage at his option.[27] It is held in this connection that, epilepsy not being a form of insanity which amounts to mental derangement, it

[24] Prine v. Prine, 36 Fla. 418, 18 So. 787, 34 L. R. A. 87; Gillett v. Gillett, 78 Mich. 184, 43 N. W. 1101; Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230; Montgomery v. U'Nertle, 143 Md. 200, 122 A. 357.

[25] Henderson v. Ressor, 141 Mo. App. 540, 126 S. W. 203; Hamaker v. Hamaker, 18 Ill. 137, 65 Am. Dec. 705; Smith v. Smith, 47 Miss. 211; Rawdon v. Rawdon, 28 Ala. 565.

[26] Orchardson v. Cofield, 71 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211; Hides v. Hides, 65 How. Prac. (N. Y.) 17; Pyott v. Pyott, 191 Ill. 280, 61 N. E. 88; Foster v. Means, 17 Speers. Eq. (S. C.) 569, 42 Am. Dec. 332.

[27] Keyes v. Keyes, 22 N. H. 553.

will not be ground for avoiding a marriage, unless coupled with fraud or made grounds for annulment by express statute.[28]

§ 414. Presumption of legality of marriage

The courts go so far as to hold that, where a person has been adjudged insane, and afterwards marries and lives with another for a number of years, the presumption of the continuation of the insanity will give way to the presumption in favor of the legality of the marriage.[29] In line with this rule, it is held in a number of jurisdictions that, where the parties have married and lived as husband and wife for a number of years, and perhaps acquired joint property, before the death of one spouse, the insanity of the dead party to the marriage cannot be shown so as to deprive his widow and children of such marriage of their rights in his estate;[30] or, at any event, the proof of such insanity of the dead spouse must be clear and strong.[31] We think this is the correct rule, as founded on equity and good public policy, although there are authorities to the contrary.[32]

§ 415. Control over marriage by state

As corollary to the rule that marriage is controlled by the law of the place of its performance,[33] it is held that the states may pass statutes regulating marriage by non compos persons, and forbidding marriage of those predisposed towards insanity, and regulating the disposition of their property, and such statutes are held not to be unconstitutional, as infringement on the rights of the individuals.[34] The result is that the rules of law

[28] Behsman v. Behsman, 144 Minn. 95, 174 N. W. 611, 7 A. L. R. 1501.

[29] Castor v. Davis, 120 Ind. 231, 22 N. E. 110.

[30] Sabalot v. Populus, 31 La. Ann. 854; Forman v. Forman (Super. Ct. N. Y.) 24 N. Y. S. 917.

[31] Henderson v. Ressor, 141 Mo. App. 540, 126 S. W. 203.

[32] Jenkins v. Jenkins, 2 Dana (Ky.) 105, 26 Am. Dec. 437.

[33] See supra, § 408.

[34] Gould v. Gould, 78 Conn. 242, 61 A. 604, 2 L. R. A. (N. S.) 531.

regulating the marriage relations and the rights growing out of the same depend very largely on local statutes, and only general rules can be given with reference to the same.

§ 416. Insanity as ground for divorce

The effect of insanity occurring subsequent to the marriage is controlled by an entirely different set of rules. It is a matter of public policy that the law should maintain the unity of the family, as society itself is founded upon its inviolability. When a man and woman enter the relation of husband and wife, they take one another for better or worse, and pledge themselves to maintain one another in prosperity and misfortune alike. When, therefore, either is stricken with insanity and becomes a helpless charge upon his fellows, every consideration of humanity and public policy requires that the other spouse be charged with the duty of caring for such unfortunate. To hold otherwise would be to give the sanction of the law to frivolous breaches of this the closest of all social ties.

§ 417. General and statutory rule

It is therefore the general rule that, in the absence of statutory provisions to the contrary, the insanity of either the husband or wife occurring subsequent to the marriage will not be ground for the dissolution of the marriage relations.[35] In a number of states, notably Arkansas, Kentucky, and Washington, statutes have been passed making confirmed, incurable, and chronic insanity of the husband or wife a ground for divorce,[36] and in these states the rule will, of course, follow the provisions of the statute. These statutes do not seem to have met with the full approval of the courts, and they have almost uniformly been

[35] Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. Rep. 559; Andrews v. Andrews Committee, 120 Ky. 718, 87 S. W. 1080; Hamaker v. Hamaker, 18 Ill. 137, 65 Am. Dec. 705; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774.

[36] Hickman v. Hickman, 1 Wash. 257, 24 P. 445, 22 Am. St. Rep. 148; Pile v. Pile, 94 Ky. 308, 22 S. W. 215.

given a strict construction.[37] For example, the courts have refused to recognize insanity as a ground for divorce, unless it is expressly made so by statute,[38] and, where such insanity is shown, they insist that it be shown to be permanent, incurable, etc., and not slight, occasional, or intermitting in its character.[39] It has even been suggested in some jurisdictions that such a statute is unconstitutional, as against public policy;[40] but this has been denied,[41] and the weight of authority seems to uphold the constitutionality of the statutes, as within the power of the state to control the status of its own citizens.

§ 418. As defense to divorce

While insanity cannot generally be made the basis of a suit for divorce, it is frequently pleaded as a defense to such an action brought by the other spouse. This defense may be based on either of two grounds, viz.: (1) Where a statute prohibits the bringing of an action for the annulment of a marriage during the insanity of one of the spouses; and (2) where insanity is relied on to excuse the acts made the basis of the suit for divorce.

§ 419. Statutory rule

Where based on the statutes of the state, the defense is, of course, governed by the statute in question. But there seems to be a tendency to give these statutes a more or less strict construction. For example, while the Texas statute on its face seems to make the fact of insanity a defense to all actions in that

[37] Newcomb v. Newcomb, 13 Bush. 544, 26 Am. Rep. 222; Hicks v. Hicks, 79 Wis. 465, 48 N. W. 495; Forman v. Forman (Super. Ct. N. Y.) 24 N. Y. S. 917; Pile v. Pile, 94 Ky. 308, 22 S. W. 215.

[38] Lloyd v. Lloyd, 66 Ill. 87; Curry v. Curry, Wils. (Ind.) 236.

[39] Smith v. Smith, 47 Miss. 211; Hicks v. Hicks, 79 Wis. 465, 48 N. W. 495.

[40] Baughman v. Baughman, 16 Pa. Dist. R. 498.

[41] Hickman v. Hickman, 1 Wash. 257, 24 P. 445, 22 Am. St. Rep. 148.

state for divorce,[42] the later decisions have restricted the defense to those cases, only, where the basis of the suit is abandonment by the alleged insane spouse.[43]

§ 420. Basis for rule

The basis of the second ground—i. e., that insanity may be pleaded as a defense to an action for divorce where the party was insane at the time of the commission of the acts made the basis of such proceedings—is founded upon the idea that acts of this class are quasi criminal in their nature, and must be accompanied by a guilty intent. If the insane spouse was mentally irresponsible at the time of the commission of the insane act or acts complained of, there could, of course, be no guilty intent, and one of the essential ingredients of the wrongful act would be wanting. It is therefore the general rule that, where the husband or wife was insane at the time he or she committed an act which would ordinarily entitle the other spouse to a divorce, such insanity may be pleaded as a bar to the annulment proceedings, especially where it can be shown that the insanity contributed to the acts made the basis for such proceedings.[44] But the fact that such spouse has become insane subsequent to the acts so complained of will not defeat the action for divorce by the other spouse,[45] except where such action is based on desertion, in which case the courts are not inclined to grant a divorce to such sane spouse, even where the insanity is subsequent to the desertion, and especially where the insanity occurs during the re-

[42] Daugherty v. Daugherty (Tex. Civ. App.) 198 S. W. 985; Skeen v. Skeen (Tex. Civ. App.) 190 S. W. 1118.

[43] Wilemon v. Wilemon, 112 Tex. 586, 250 S. W. 1010.

[44] Fisher v. Fisher, 54 W. Va. 146, 46 S. E. 118, 1 Ann. Cas. 251; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Sapp v. Sapp, 71 Tex. 348, 9 S. W. 258; Tiffany v. Tiffany, 84 Iowa, 122, 50 N. W. 554; Smith v. Smith, 33 N. J. Eq. 458.

[45] Wilemon v. Wilemon, 112 Tex. 586, 250 S. W. 1010; Fisher v. Fisher, 54 W. Va. 146, 46 S. E. 116, 1 Ann. Cas. 612; Garnett v. Garnett, 114 Mass. 379, 19 Am. Rep. 369; Harrigan v. Harrigan, 135 Cal. 397, 67 P. 506, 87 Am. St. Rep. 118.

quired period of separation.[46] The reason for the rule is the great opportunity that might be given the sane spouse to impose upon the insane spouse in this connection, and the further fact that one must entertain an intent to desert or remain separated during the entire period of separation, which in turn presupposes a mind capable of entertaining an intent.

§ 421. Defense to adultery

In most of the civilized countries, adultery, above all others, is a ground for divorce, as it is a breach of the marriage contract, and contravenes the most sacred laws of society; yet it is well settled in practically all of the states of the Union that the insanity of the offending party at the time of the adulterous act will bar any action by the other spouse for a divorce by reason thereof.[47] The courts of Pennsylvania alone seem to have adopted the opposite rule, on the ground that it is a matter of public policy to prevent the corruption of the source of generation, and keep same pure, regardless of the moral responsibility of the subject.[48] Where insanity is offered as a defense to divorce proceedings, there must have been an actual subversion of the mental faculties, so that the offending spouse cannot understand and appreciate the nature of the act and its probable consequences;[49] and no amount of moral depravity, abandoned habits, and uncontrollable sexual inclinations will excuse, in the absence of a showing that such person was unable to understand the right and wrong of the act.[50] As indicated, the insanity must have existed at the time of the commission of the act in

[46] Wilemon v. Wilemon, 112 Tex. 586, 250 S. W. 1010; Messick v. Messick, 177 Ky. 337, 197 S. W. 792, L. R. A. 1918A, 1184.

[47] Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352; Wray v. Wray, 19 Ala. 522; Yarrow v. Yarrow [1892] P. 92; Kretz v. Kretz, 73 N. J. Eq. 246, 67 A. 378; Scheick v. Scheick, 5 Neb. Unof. 142, 97 N. W. 474; Horn v. Horn, 142 App. Div. 848, 127 N. Y. S. 448.

[48] Matchin v. Matchin, 6 Pa. 332, 47 Am. Dec. 466.

[49] Yarrow v. Yarrow, [1892] P. 92; Hansell v. Hansell, 3 Pa. Dist. Ct. R. 724.

[50] Hill v. Hill, 27 N. J. Eq. 214.

question. Earlier English authorities deny this, and hold that insanity occurring after the act of marital unfaithfulness would at least be ground for a stay of action, as the insane spouse was no longer capable of making a proper defense; but it is now the general rule in both England and the United States that the insanity of the guilty spouse, occurring after the alleged adulterous act, will not be heard in bar of action for divorce by the other spouse.[51]

§ 422. As affecting property rights created by marriage

As a corollary to the rule that an action for divorce on the grounds of adultery cannot be maintained, where it is established that the offending spouse was insane at the time of the adulterous act, it is held that the adultery of the wife, committed while she was insane, will not affect her rights in her husband's estate, as, for example, her right of alimony, since she cannot be charged with responsibility for acts committed under such circumstances, and the husband is still charged with the duty of maintaining her.[52]

§ 423. As defense to abandonment

It is also the rule that insanity may be pleaded as a defense to an action for divorce on the grounds of abandonment and nonsupport, where it appears that such insanity existed at the time of such abandonment or failure to furnish the support. This is true, even where the abandonment or nonsupport are made grounds for divorce by statute.[53] The reason for the rule, as in cases of adultery, is that the insane person is not responsible

[51] Rowden v. Rowden, 2 Swab. & T. 417, 31 Law J. M. Cas. (N. S.) 94, 8 Jur. (N. S.) 157, 6 Law T. (N. S.) 27, 10 Wkly. Rep. 292; Morduant v. Moncrieffe, 42 Law J. Mat. Cas. (N. S.) 49, 30 Law T. (N. S.) 639, 22 Wkly. Rep. 12; Rathbun v. Rathbun, 40 How. Prac. 328; Stratford v. Stratford, 92 N. C. 297; 2 Bishop, Marriage, Divorce, and Separation, § 518.

[52] Mims v. Mims, 33 Ala. 98; Wray v. Wray, 33 Ala. 187.

[53] Wilemon v. Wilemon, 112 Tex. 586, 250 S. W. 1010.

for acts committed while insane, and for that reason a breach of the marriage contract cannot be imputed to him.[54] But, as in the case of adultery, the insanity must have ordinarily existed at the time the act complained of is committed. It has been held that a divorce may be granted on the ground of abandonment, notwithstanding the insanity of the defendant, where it is shown the insanity occurred since the act of abandonment, but before the statutory period has expired.[55] However, this rule has not met with general approval, as we have indicated supra,[56] and we believe the true rule to be that the insanity must have occurred after the statutory period of abandonment has expired, before it can be considered subsequent insanity, in the sense that a suit for divorce may be maintained notwithstanding its existence.[57]

§ 424. As defense to cruel, etc., treatment

Likewise, as in case of the two other instances, adultery and abandonment and nonsupport, discussed in the foregoing pages, it is well settled that insanity at the time of the acts complained of may be pleaded in defense to an action for divorce based on the grounds of cruel, harsh, and inhuman treatment of one of the spouses by the other spouse.[58] The reason given for the rule is that intent and motive are necessary ingredients of the of-

[54] Baker v. Baker, 82 Ind. 146; Pile v. Pile, 94 Ky. 309, 22 S. W. 215; Franklin v. Franklin, 53 Kan. 143, 35 P. 1118; Storrs v. Storrs, 68 N. H. 118, 34 A. 672; Daugherty v. Daugherty (Tex. Civ. App.) 198 S. W. 985.

[55] Douglass v. Douglass, 31 Iowa, 421; Storrs v. Storrs, 68 N. H. 118, 34 A. 673.

[56] See supra, § 421.

[57] Wright v. Wright, 125 Va. 526, 99 S. E. 515, 4 A. L. R. 1331; Messick v. Messick, 177 Ky. 337, 197 S. W. 792, L. R. A. 1918A, 1184; Porter v. Porter, 82 N. J. Eq. 400, 89 A. 251.

[58] Tiffany v. Tiffany, 84 Iowa, 122, 50 N. W. 554; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Cohn v. Cohn, 85 Cal. 108, 24 P. 659; Sapp v. Sapp, 71 Tex. 348, 9 S. W. 258; Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, 6 L. R. A. 548, 17 Am. St. Rep. 313; Pile v. Pile, 94 Ky. 309, 22 S. W. 215.

fense of cruel, unjust, and humiliating treatment towards another, and where a person is so mentally deranged as not to know the right and wrong of his acts, there can be no evil motive.[59] Therefore, where the alleged cruel treatment springs from an insanely jealous temperament, mental irritation arising from fatigue and anxieties over business, or even where mental delusions are present, but are not of a nature such as will render the person so affected incapable of telling right from wrong, the defense of insanity will not be heard.[60]

§ 425. Falsely imputing insanity as ground for divorce

While insanity itself is not a ground for divorce, falsely accusing another of being insane, or wrongful attempt to commit a spouse to an asylum, may be. As insanity restricts one's rights, and more or less isolates him from society of others, it might be very painful to one's feelings and hurtful to his property rights for another to falsely create the impression among the people such person is regularly brought in contact with that he or she was insane. It is therefore held that, where cruel treatment is made a ground for divorce, falsely accusing of one spouse by the other as being insane is such cruel treatment as will bring the case within the statute.[61] But as one of the essentials of the offense is a wrong intent against the maligned spouse, where the charge of insanity is made in good faith and under the actual belief in its truth, it will not be ground for divorce.[62]

[59] Hansell v. Hansell, 3 Pa. Dist. Ct. R. 724; Hanbury v. Hanbury [1892] P. 223.

[60] Walton v. Walton, 57 Neb. 102, 77 N. W. 392; Thomason v. Thomason, 142 Ky. 176, 134 S. W. 161; Martin v. Martin, 8 Wkly. Rep. 367; Smith v. Smith, 33 N. J. Eq. 458.

[61] Michels v. Michels, 120 Me. 395, 115 A. 161, 18 L. R. A. 570; Andrews v. Andrews, 120 Cal. 184, 52 P. 298; Beebe v. Beebe, 174 App. Div. 408, 160 N. Y. S. 967; Harrison v. Harrison, 115 La. 817, 40 So. 232.

[62] Reichert v. Reichert, 124 Mich. 694, 83 N. W. 1008; Wilson v. Wilson (Mo. App.) 190 S. W. 53.

§ 426. Status of non compos as plaintiff

In the preceding paragraphs, we have considered the effect of insanity where the non compos was the defendant in a divorce suit. It frequently occurs that the non compos is plaintiff, either by reason of an original suit filed by him, or in his name, or by way of cross-complaint in an action originally brought by the other spouse. It then becomes important to determine what effect his insanity will have on his rights to maintain such action.

In determining this, the courts have taken into consideration that the right to ask for divorce is a right personal to the party aggrieved. Since the policy of the law is to avoid the breaking up of families, and the right in question is a personal one, the injured spouse will be allowed to condone the most flagrant breach of the marriage contract on the part of the other spouse. Divorce is only tolerated, in general, as a right of one spouse to extract himself or herself from an intolerable position. Therefore, the bringing of divorce proceedings not being so much in the nature of a right, as of a privilege to be exercised within the injured party's sound discretion under all the circumstances of the particular case, and an insane person not being in a condition to exercise a sound discretion in the matter, such divorce proceeding will not be allowed in behalf of the non compos by his guardian, or by another as "next friend," unless it is expressly allowed by statute.[63] We would suggest that an exception to the rule might be found in the case where such divorce was obviously necessary for the protection or well-being of the non compos, as, for example, where it was necessary to protect his or her health, in which case the law would likely imply a determination on the part of the non compos to bring the suit. Also, the

[63] Worthy v. Worthy, 36 Ga. 45, 91 Am. Dec. 758; Bradford v. Abend, 89 Ill. 78, 31 Am. Rep. 67; Birdzel v. Birdzel, 33 Kan. 433, 6 P. 561, 52 Am. Rep. 539; Clowry v. Clowry, 8 O. C. D. 652, 16 Ohio Cir. Ct. R. 302; Iago v. Iago, 168 Ill. 339, 48 N. E. 30, 39 L. R. A. 115, 61 Am. St. Rep. 120; Ellis v. White, 61 Iowa, 644, 17 N. W. 28; 2 Bishop, Marriage and Divorce, § 306a.

objection to the insanity of the plaintiff, or the form in which the action is brought—i. e., that it is commenced by a next friend, and not by the regularly appointed guardian or committee—must be made during the progress of the suit, and it comes too late when made after judgment has been entered.[64] This rule has been extended so as to include spendthrifts; that is to say, a divorce suit cannot be brought on behalf of such spendthrift by his guardian, because it is a matter in which the spendthrift has the right of exercising his personal discretion.[65]

§ 427. Statutory rule

The contrary is established by statute in the courts of some of the states and in the English courts. In some of the American states, statutes have been passed which expressly give the guardian, committee, or even next friend of insane persons the right to institute divorce proceedings against the other spouse; but in such jurisdictions the tendency of the courts has been to recognize the difficulty of arriving at the true facts, where, as in this class of cases, one of the parties is incapable of testifying or instructing his counsel, and the courts will scrutinize the evidence very closely and proceed with utmost caution.[66] It has been held that the courts will not extend the effect of such statutes by construction. For example, such statutes will not authorize the bringing of a divorce suit on behalf of a spendthrift by his guardian, etc., although the status of a spendthrift is generally considered as that of a non compos person.[67]

As indicated, the English courts, irrespective of statute, have held to the rule that an action for divorce can be brought on behalf of an insane person, and may be carried on under the direc-

[64] Mims v. Mims, 33 Ala. 98.

[65] Winslow v. Winslow, 7 Mass. 96.

[66] Garnett v. Garnett, 114 Mass. 379, 69 Am. Rep. 369; Cowan v. Cowan, 139 Mass. 377, 1 N. E. 152; Denny v. Denny, 8 Allen (Mass.) 311; Thayer v. Thayer, 9 R. I. 377.

[67] Winslow v. Winslow, 7 Mass. 96.

tion of the Chancellor, who is the keeper of the conscience of the incompetent person.[68]

§ 428. As affects control of person and property

Where one of the members of the marital union becomes insane, and is no longer able to exercise a discretion, the right of control over the person and property of such non compos becomes important, not only because his helplessness may require increasing care, but because he is no longer able to give the other member of the union aid in the carrying on of the marital affairs. The rights of the parties under such conditions are now frequently controlled by local statutes, and, where such statutes exist, they will, of course, furnish the rule in that jurisdiction; but, in those jurisdictions where there is no statutory law on the subject, the rules are nevertheless fairly uniform, and fall into two general classes, viz.: Those which have grown up in the states where the common-law idea of marriage has been superseded by the partnership, or community, status; and those jurisdictions where the common-law idea of marriage is still in force.

§ 429. In community states

To understand the rule in the states where marriage is considered in the light of a partnership, it must be kept in mind that the property held by the connubial firm and its members falls into three distinct classes; i. e., the separate property of the husband, the separate property of the wife, and the community, or joint property of the two; and that the husband, in theory at least, is the head, or controlling member, of the "firm" and manager of the common property, and, in a more limited sense, of the separate property of the wife as well. On the other hand, the wife's right of control is limited to her separate estate in a more or less restricted sense, and to a voice in the disposal of the community estate, and portion of the husband's estate which

[68] Baker v. Baker, L. R. Prob. Div. 142, 49 L. J. Prob. (N. S.) 49, 42 Law T. (N. S.) 332, 28 Wkly. Rep. 630.

is being used as a homestead, or is counted as her dower. It will be seen at once that the insanity of the husband will necessarily have a more far-reaching effect than that of the wife.

§ 430. Insanity of wife

In some jurisdictions, where the wife becomes insane after the marriage relation is entered into, there is, ordinarily, little reason for changing the existing management and control of the property, so far as the community estate is concerned, which is continued in the husband as before, with the exception that his control over the same is extended, so that he is frequently authorized to act by himself, unless forbidden to do so by statute. For example, while the husband, under such circumstances, may ordinarily convey the community homestead, yet in those states where statute requires the husband and wife to join in the conveyance of such homestead, the husband may not act alone, even though the wife is insane, and even though the prohibition cuts off the possibility of making any conveyance at all;[69] but this rule is denied in other jurisdictions, especially in the later decisions, and it is held that, since the wife cannot join in the conveyance, the law will not ask an impossibility.[70] Also the husband may ordinarily convey the community homestead to pay community debts.[71] Where the statutes make no exceptions in case of insanity, the courts have refused to do so by construction, even to the extent of allowing the husband to act for the wife as her guardian,[72] since a guardian may not himself or-

[69] Weatherington v. Smith, 77 Neb. 363, 109 N. W. 381, 13 L. R. A. (N. S.) 430, 124 Am. St. Rep. 855; Adams v. Gilbert, 67 Kan. 273, 72 P. 769, 100 Am. St. Rep. 456; Whitlock v. Gosson, 35 Neb. 829, 53 N. W. 980; Thompson v. New England Mortgage Security Co., 110 Ala. 400, 18 So. 315, 55 Am. St. Rep. 29; Ballenger v. Lester, 113 Ky. 96, 67 S. W. 266.

[70] Gersdorff v. Torres (Tex. Com. App.) 293 S. W. 560; Reynolds Mortgage Co. v. Gambill, 115 Tex. 273, 280 S. W. 531.

[71] Pierce v. Gibson, 108 Tex. 62, 184 S. W. 502, 1 L. R. A. 1675.

[72] See 15 Ann. Cas. 1122.

dinarily act with the husband in the conveyance of the homestead.[73] In some states, notably California, the statutes make provision for this contingency, and allow the husband to act by himself.[74] However, the objection is usually obviated by the husband first abandoning the homestead, which he can do as head of the family, and then disposing of it as he would any other community real estate.

§ 431. In common-law states

In the jurisdictions where the common-law rule, with reference to property rights during marriage relations, is in force, a much simpler rule prevails. As the existence of the wife is not recognized, and all the property is vested in the husband, the subsequent insanity of the wife will have little or no effect on the right of control and disposition of property by the husband, or the control over the person of the wife.

§ 432. Insanity of husband

When the husband, the managing head of the connubial firm, is stricken with insanity, so as to render him incapable of continuing in that capacity, a much more difficult question presents itself. However, as the wife is the surviving member, and the one who, next to the husband, is most interested in the estate, and who is most concerned about his welfare, it is generally held that she is entitled to the management of the community estate and care of the husband, subject to reasonable restriction. Through necessity, she becomes in effect the head of the family,[75] and as such she may pledge, mortgage, or even dispose of the community estate to secure necessities for herself and her

[73] Singleton v. National Land Co., 183 Iowa, 1108, 167 N. W. 97.

[74] Rider v. Regan, 114 Cal. 667, 46 P. 820; Weatherington v. Smith, 77 Neb. 363, 109 N. W. 381, 13 L. R. A. (N. S.) 432, 124 Am. St. Rep. 855; Green v. Windham, 115 Tex. 162, 278 S. W. 1101.

[75] Holloway v. Holloway, 86 Ga. 576, 12 S. E. 943, 11 L. R. A. 518, 22 Am. St. Rep. 484; Robinson v. Frost, 54 Vt. 105, 41 Am. Rep. 835.

family;[76] and such mortgage or conveyance will have added force, where the rights of innocent third parties have intervened.[77] In this connection it has been held that, where a statute gives certain exemptions, etc., to the "head of the family," the wife of an insane person so far becomes the head of the family that she may qualify under the terms of such statute.[78] In Texas, where there are no children, the entire community estate passes to the wife upon the husband becoming insane; and, when there are children, she may nevertheless come into full control by complying with the statute for community administration.[79] Since the passage of this statute, as the right of control over the community property passes to the guardian, the wife of an insane person may not ordinarily dispose of the community property;[80] and this is true, whether a guardian has been appointed or not, since the statutory remedy disposes of the principle of necessity on which the wife's power of control was based.[81] The proper proceeding in such case is for the wife to exercise her right of preference to appointment of a guardian under the statute.[82] In general, it is held that the wife is the natural guardian of the insane husband.[83] But the insanity of the husband does not ordinarily affect the local status of the property, so as to change it from community property to separate property of the other spouse; the management and control alone being in question.[84]

[76] Forbes v. Moore, 32 Tex. 195.
[77] Rider v. Regan, 114 Cal. 667, 46 P. 824.
[78] Ecker v. Lindskog, 12 S. D. 428, 81 N. W. 905, 48 L. R. A. 155.
[79] Howell v. Fidelity Lumber Co. (Tex. Com. App.) 228 S. W. 181.
[80] Heidenheimer v. Thomas, 63 Tex. 287, 292.
[81] Texas & P. Ry. Co. v. Bailey, 83 Tex. 24, 18 S. W. 481.
[82] Rev. St. Tex. 1911, art. 4076.
[83] See 34 L. R. A. 223.
[84] Hotard v. Hotard, 12 La. Ann. 145; Howell v. Fidelity Lumber Co. (Tex. Com. App.) 228 S. W. 183.

§ 433. Separate estate of wife

Just how far the wife's right of independent action, with reference to the disposition of her separate estate, is revived by the subsequent insanity of her husband, depends very largely upon the interpretation given to local statutes. Ordinarily the husband, even when he is of normal mind, has but the right of control and management over the separate property of the wife, but no proprietary interest in the property itself, and his assent is all that is required to enable the wife to make a binding conveyance. Where insanity has clouded the mind of the husband, so that he is no more able to give this assent than if he were physically dead, both necessity and reason demand that his formal assent be dispensed with, and that the wife be left free to transfer or mortgage her property as if she were a feme sole. Furthermore, as an additional reason, it would seem that a separate acknowledgment on the part of the wife would no longer be necessary, as all presumption of coercion on the part of the husband would be removed by reason of his helpless condition, occasioned by his insanity.[85] Therefore, in the absence of contrary statutory enactment, it is the general rule that the insanity of the husband will authorize the wife to reassume control of her separate property under the same principles which will authorize her to do so in case of abandonment by the husband;[86] but, where the separate property has become a homestead, the tendency is not to allow a conveyance of it by the wife alone, unless to secure necessities for herself and family.[87]

[85] Reeve, Dom. Rel. 138.

[86] Clark v. Wicker (Tex. Civ. App.) 30 S. W. 1114.

[87] Lawson v. Armstrong (Tex. Civ. App.) 227 S. W. 687; Brothers v. Bank of Kaukauna, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; Weatherington v. Smith, 77 Neb. 363, 109 N. W. 381, 13 L. R. A. (N. S.) 430, 124 Am. St. Rep. 855.

§ 434. Separate estate of husband

As the wife has no control over the estate of the husband under normal conditions, except to the extent of her homestead rights, it necessarily follows that she acquires none by his becoming insane, except as the necessities of the case may require. The rule is therefore fairly well established, in both the community and the common-law states, that an insane husband can only sell or mortgage his property through a regularly appointed guardian or committee, and that the wife, ordinarily, has no power to do so, except to the extent of charging it with the value of necessities for herself and her family.[88]

§ 435. Liability of estate for necessities

From the very necessity of the case, the courts are inclined to relax the rules with respect to the power of charging the estate, or either the community or separate property, with the value of necessities. Otherwise, a non compos with ample means might be allowed to suffer for ordinary necessities, and his dependents might be placed in actual want. It is therefore generally held that the insanity of the husband will in no wise lessen obligations to provide for his family, where he has the means to do so. In such cases, the right of recovery on the part of one furnishing such necessities is predicted on the common-law liability of the husband to provide for the maintenance of his wife and children.[89] Care, shelter, medical services, and clothing have all been held to be necessities; and where another, whether it be a state, county, or individual, furnished these in good faith, the law will imply a promise on the part of the husband to pay

[88] Richardson v. Du Bois, Law Rep. 5 Q. B. 51, 39 Law J. Q. B. (N. S.) 69, 21 Law T. (N. S.) 635, 18 Wkly. Rep. 62, 10 Best & S. 830; Pearl v. M'Dowell, 3 J. J. Marsh. (Ka.) 658, 20 Am. Dec. 199; Harris v. Davis, 1 Ala. 259; Sawyer v. Cutting, 23 Vt. 486; Forbes v. Moore, 32 Tex. 195; Heidenheimer v. Thomas, 63 Tex. 287; Alexander v. Miller, 16 Pa. 215.

[89] See supra, § 385; 32 C. J. 686.

their reasonable value, whether he is sane or insane. As the common law does not charge a wife with the support of a husband, it is generally held that the separate estate of the wife cannot be charged with necessities for the insane husband; and some authorities go so far as to hold that the separate estate of the insane wife is not liable for her support during the lifetime of a sane husband, who is financially able to provide for her.[90] But as a rule like this might work a great hardship upon the incompetent, because the meeting of her necessities might have to wait proceeding against the husband, we think that the better rule is that such estate could be charged with the support of the wife, but it could in turn look to the estate of the husband for reimbursement.[91] In California it seems to be held, under the construction of local statutes, that the separate estate of the wife can be charged with the support of the insane husband;[92] but the general rule, in the absence of statutes, is as above stated.

§ 436. Effect on homestead rights

Since the question of homestead is very closely related to the marriage relation itself, in that it grows out of the necessity of providing a living place for the family, which results from the marriage, the breaking up of the family by the insanity of one of the members necessarily has an important bearing on the continuance of the homestead. The question usually takes the form of whether or not the homestead has been abandoned by the removal of the insane person to an asylum or hospital, or by his voluntary removal to other premises while he is too insane to make a rational choice. But in neither of these cases is the homestead considered as abandoned. In the first instance, his voluntary removal to an asylum, etc., even for a protracted period, can hardly be considered a voluntary abandonment of the

90 Dickel v. Smith, 38 W. Va. 635, 18 S. E. 721; Hospital v. Fountain, 129 N. C. 90, 39 S. E. 734.

91 Bliss v. Bliss, 133 Md. 61, 104 A. 467; Gardner v. Maroney, 95 Ill. 552.

92 Watt v. Smith, 89 Cal. 602, 26 P. 1071.

already acquired homestead, since he has been allowed no discretion in the matter.[93] In the latter case, it is held that, having once acquired a homestead, he cannot be charged with abandoning it, whatever his acts, because (1) the law will not allow him to relinquish, to his prejudice, a right once acquired; and (2) abandonment of so valuable a right carries with it the idea of an intelligent choice, and there can be no such choice, or intention, where there is no mind to exercise it.[94] But the insanity of the wife will not affect the right of the husband to abandon the homestead, where he has right of choice.[95]

[93] Higgins v. Higgins, 117 Ky. 725, 78 S. W. 1124, 25 Ky. Law Rep. 1824.

[94] White's Guardian v. Martin, 2 Alaska, 495; National Loan & Building Ass'n v. Maloney, 22 Ky. L. Rep. 1094, 60 S. W. 12; Flynn v. Hancock, 35 Tex. Civ. App. 395, 80 S. W. 245; Withers v. Love, 72 Kan. 140, 83 P. 204, 3 L. R. A. (N. S.) 514; Decennial and Other Key No. Digests, Homestead, ⊜No. 163.

[95] Pierce v. Gibson, 108 Tex. 62, 184 S. W. 502, 1 L. R. A. 1675; Higgins v. Higgins, 117 Ky. 725, 78 S. W. 1124.

CHAPTER 13

LEGAL STATUS WITH REFERENCE TO TORTS

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§ 437. Responsibility for tort, in general

With certain exceptions, hereinafter noted, a non compos person is liable for his tortious acts to the same extent as a normal person.[1] In this respect, the rule is essentially different from that relating to crimes[2] and contracts,[3] in both of which intent is a necessary element. Moreover, in assessing a penalty for crime, the end sought to be attained is not so much the punishment of the alleged criminal as it is the determent of the criminal from further criminal acts by fear of additional punishment; and it is evident that no such end can be attained where the subject cannot understand and appreciate the purpose of the penal-

[1] McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140; Avery v. Wilson, 20 F. 856; Young v. Young, 141 Ky. 76, 132 S. W. 155; Tucker v. Hyatt, 151 Ind. 332, 51 N. E. 469, 44 L. R. A. 129; Ballinger v. Roder, 153 N. C. 488, 69 S. E. 497; Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743; Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128.

[2] See ante, § 448.

[3] See ante, § 333 et seq.

ty; while, as the purpose of allowing damages in the case of tort is compensatory only, the end of making amends to the injured party can be as surely attained where the tort-feasor is non compos as where he is fully sane. Also, the refusal of the courts to enforce the contract against the non compos is sometimes placed on the ground that the act was a discretionary one on the part of the opposite party, which he voluntarily entered into, and with reference to which he can usually be put back in statu quo without material injury to any one, and at the same time the non compos can be protected against his indiscretion by the nonenforcement; but the opposite party in a tort action has no choice, and hence no opportunity, of avoiding the damage, and can only be put back in statu quo by the allowance of damages. It will therefore be seen that the same rules cannot be used to measure the force of the claim for damages growing out of tort as are used in measuring responsibility on contracts and crime. The rules applied to the non compos in this respect are analogous to those governing the responsibility of infants,[4] as the rules in both cases are founded on the idea of the absence of mental responsibility.

§ 438. Reason for rule

The reasons for the rule allowing recovery for the tort of a non compos person are stated by the authorities as threefold, viz.:

(1) Where one of two innocent persons must bear a loss, it should properly fall on him whose act caused it.[5] The sufferer in such case is in no way to blame, and the non compos must bear the loss as he bears his other misfortunes.

(2) Public policy requires the enforcement of such a rule, in order that the friends and relatives of the non compos, and especially those who have an expectancy in his estate and who

[4] Chandler v. Deaton, 37 Tex. 406.

[5] Beals v. See, 10 Pa. 56, 49 Am. Dec. 573; Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743; 21 Ann. Cas. 1353.

might therefore expect to suffer from any diminution of the same by reason of the payment of damages, will be induced to restrain the non compos.[6] It can readily be seen that relatives, who might otherwise selfishly allow the non compos to injure others, would be moved to watch over and restrain him when the result of such injuries would indirectly fall on them.

(3) So deep is the cunning of the evil doer that it is extremely difficult to detect the ruse, when he is feigning insanity as a cloak under which he may safely work his nefarious ends. The rule is therefore necessary, in order that the evil doer may not be led to simulate madness as a means of escaping the consequence of his tortious acts.[7]

While this last reason by itself has little weight, since it might lead to punishing many innocents to reach one evil doer, yet it adds considerable force to the other reasons given above.

§ 439. Applications of rule—Examples of

The classes of torts for which an insane person may be responsible cover practically the entire field, with a few exceptions hereafter noted, and may consist of acts of omission, as well as acts of commission.[8] Though an insane person may not be responsible criminally, he may nevertheless in most cases be made to respond in damages for the act as a tort. For example, he may not be prosecuted for murder, but he may be sued by the surviving relatives of the victim for compensatory damages, where such relatives would ordinarily have a claim for damages for such death.[9] Similarly, he can be made to answer for dam-

[6] Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743; Cooley, Torts (1895 Ed.) pp. 27, 28.

[7] Cooley, Torts (1895 Ed.) pp. 27, 28; Beals v. See, 10 Pa. 56, 49 Am. Dec. 573; Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349; McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140.

[8] Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743.

[9] Ballinger v. Rader, 153 N. C. 488, 69 S. E. 497.

ages for assaults,[10] arson,[11] trespass and conversion,[12] etc. Also, he can be made to answer for acts which are quasi criminal in their character, although they may not be actually punishable as a crime; e. g., fraud,[13] destruction or injury to property intrusted to him as bailee,[14] infringement of patents,[15] etc. There is some suggestion in the authorities that the fact that the injured party knew of the tort feasor's insanity and that he might have prevented the tort would not in any way relieve the non compos from liability.[16] But the logic of this last rule is doubtful, and such knowledge on the part of the injured party and his failure to prevent the act, where he was reasonably able to do, would at any rate be admissible to show contributory negligence on the part of the injured party which might bar a recovery. The guardian of the non compos may recover against his ward for torts committed against himself,[17] where the injury is not brought about by the guardian's negligence, and where the fact that the non compos is under guardianship will in no way affect his general liability for his tortious acts;[18] but he may not include it in his account as guardian, unless the liability against the estate of the ward has been fixed by judgment. Not only will the non compos be responsible for positive acts which constitute torts, but he may be held liable for omissions and negligent acts as well; in other words, he will be held responsible

[10] Moore v. Horne, 153 N. C. 413, 69 S. E. 409, 138 Am. St. Rep. 675, 21 Ann. Cas. 1350; Taggard v. Innes, 12 U. C. C. P. 77; Feld v. Borodofski, 87 Miss. 727, 40 So. 816.

[11] Mutual Fire Ins. v. Showalter, 3 Pa. Super. Ct. 452; Stanley v. Hayes, 8 Ont. L. Rep. 81. See 42 L. R. A. (N. S.) 84.

[12] White v. Farley, 81 Ala. 563, 8 So. 215; In re Wolf, 9 Kulp, 523. See 42 L. R. A. (N. S.) 84; 21 Ann. Cas. 1354.

[13] Spaulding v. Harvey, 129 Ind. 106, 28 N. E. 323, 13 L. R. A. 619, 28 Am. St. Rep. 176.

[14] Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349.

[15] Avery v. Wilson, 20 F. 856.

[16] Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349.

[17] Brown v. Howe, 9 Gray (Mass.) 84, 69 Am. Dec. 276.

[18] Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423.

for acts of nonfeasance as well as of misfeasance,[19] as, for example, where the insane person has negligently allowed premises controlled by him to become unsafe, and personal injury has resulted therefrom to another.[20] It seems to be held that he will, in questions of negligence, be held to the same degree of care as normal persons.[21] The liability for torts extended to official acts wrongfully exercised, as where a public official, insane though he be, is guilty of some tort, for example, false imprisonment.[22]

§ 440. Exception to rule

An apparent exception to the rule which allows recovery against an insane person for damage occasioned by his torts is found in that class of torts which has an evil intent, or animus, as a necessary ingredient of the act itself; for example, malicious prosecution. In such cases a recovery cannot be had, because malice is a necessary element of the act, and an insane person is without mental capacity to entertain malice.[23] What would in a normal person be abusive and actionable words become in the case of a non compos the mere ravings of a disordered mind, which should be disregarded as being without meaning or purpose, and as having no power to injure.

[19] Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743; Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128.

[20] Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423.

[21] Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743.

[22] Krom v. Schoonmaker, 3 Barb. (N. Y.) 647.

[23] Irvine v. Gibson, 117 Ky. 306, 77 S. W. 1106, 111 Am. St. Rep. 251, 4 Ann. Cas. 569; Yeates v. Reed, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58; Bryant v. Jackson, 6 Humph. (Tenn.) 199; Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743.

§ 441. Slander and libel—Liability for

While the above exception is fairly well settled as a general proposition, its application to slander and libel is disputed in some jurisdictions. On the one hand, it is contended that an evil intention is the necessary essence of libel and slander, since its chief element is its untrue slanders, intentionally broadcasted, with intention of injuring the slandered person, and it would be absurd to impute such an intention to, and allow an action and recovery against, one whose purported slanderous words were but the babblings of a disordered mind, to which no one should give heed.[24] On the other hand, it is contended with force by other authorities that malice is presumed in the case of unfounded reports calculated to injure the person about whom they are made, and that, in addition, a libel once set going by the non compos may, and most frequently does, come to the ears of the person having no notice of the source from which it first issued and material injury results to the person about whom it is published.[25] We suggest the true rule will be found somewhat between the two views we have discussed. While ordinarily, where the person uttering the slander or publishing the libel is notoriously insane, a plea of insanity will be good; yet where the insanity is slight in its character, or is not generally known, or has traveled to ears that have not been notified it was initiated by a lunatic, and it is of a nature calculated to injure the person slandered, the estate of the non compos will be liable for the actual damages directly resulting from such libel or slander. Yet another exception to the rule which holds insane persons liable for their torts is found in that class of torts which grow out of or are de-

[24] Cooley, Torts, p. 103; Irvine v. Gibson, 117 Ky. 306, 77 S. W. 1106, 111 Am. St. Rep. 251, 4 Ann. Cas. 569; Yeates v. Reed, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43.

[25] Ullrich v. New York Press Co., 50 N. Y. S. 788, 23 Misc. Rep. 168; Yeates v. Reed, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; McDougald v. Coward, 95 N. C. 368; Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58.

pendent upon contracts. For example, where one contracts to sell goods or property for another, and delivers him the proceeds, but breaches such contract by selling the goods or property and appropriating the proceeds, in which case he is guilty of conversion, which is a tort. In such case, it is reasoned that to make such an incompetent liable would be to recognize the force of the illegal contract, which is nonenforceable because of such person's mental incompetency. It is therefore held that a person incapable of making a contract cannot be held on a tort growing out of such contract.[26]

§ 442. Exemplary, etc., damages—Liability for

As corollary to the proposition that the non compos will not be liable for his torts founded on malice, it necessarily follows that damages otherwise recoverable cannot be increased by the purported presence of malice. Only actual damages can in any event be recovered; and no recovery can be had for punitive or exemplary damages, since such recovery would have to be based on the idea of a malicious intent on the part of the non compos, which would be inconsistent with the fact that the defendant was insane.[27]

§ 443. Rule as applying to drunkenness—Liability for

As the law is not inclined to allow one to excuse his wrong to another by incapacity induced by his own act, it is held that a tort will not be excused because the person committing it was under the influence of intoxicating liquor at the time of the commission, even where the drunkenness amounts to temporary insanity.[28] In addition to the three reasons noted above for not al-

[26] Sandoval v. Eagle Pass Lumber Co. (Tex. Civ. App.) 248 S. W. 132, 134.

[27] Moore v. Horne, 153 N. C. 413, 69 S. E. 409, 138 Am. St. Rep. 675, 21 Ann. Cas. 1350; Cross v. Kent, 32 Md. 581; McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140; Jewell v. Colby, 66 N. H. 399, 24 A. 902.

[28] See infra, note 29.

lowing an insane person to escape liability for his torts, all of which apply with equal force to acts of an intoxicated person, there is the additional reason that the law will not allow one to take advantage of his own wrong, and where a person has voluntarily placed himself in a condition where he is likely to commit a forbidden act, he will not be heard to plead that condition in extenuation of an act he has committed.[29] However, the intoxication may be shown to disprove malice on the part of the tort-feasor, where malice is sought to be shown.[30] But intoxication ordinarily may not be shown to escape claim for exemplary damages, since self-induced incompetency may not be shown as a mitigating circumstance, and furnishes no reason why such damages should not be allowed "for the sake of example and by way of punishing the defendant." [31]

§ 444. As affecting negligence

Where the acts complained of are misfeasance, involving the question of negligence, the intoxication of the tort-feasor may not only be no defense, but it may be somewhat of a boomerang in its effect. While it has been held that intoxication is not of itself negligence, yet it may be shown as a fact or circumstance tending to show negligence. This is on the theory that one making himself intoxicated puts him in a disadvantageous position for the meeting of contingencies that may arise, and tends to show a want of due care on his part. For example, a person who approached a railway crossing in a closed vehicle from which he could not see an approaching train might be shown to be intoxicated as tending to show negligence in his way and means of approach to a place of danger.[32]

[29] McKee v. Ingalls, 4 Scam. (5 Ill.) 30; Reed v. Harper, 25 Iowa, 87, 95 Am. Dec. 774.

[30] Gates v. Meredith, 7 Ind. 440.

[31] St. Ores v. McGlashen, 74 Cal. 148, 15 P. 452; Schmidt v. Pfeil, 24 Wis. 452.

[32] Herrick v. Washington Water Power Co., 75 Wash. 149, 134 P. 934, 48 L. R. A. (N. S.) 640.

§ 445. Liability for torts of others

The courts of the American states are not inclined to extend the responsibility of the non compos to cover the acts of his servants and agents in respect to tortious acts committed by them, even when such acts are committed in connection with the business of the non compos. Where the acts in question are done by the direction of the non compos or in his presence there is some suggestion in the authorities that he might be held liable on the theory that he participated in the acts and they were in fact his own acts;[33] but, where the acts of the agent or servant are done out of the presence of the non compos, and especially where they are done by an agent or servant appointed by the guardian rather than the non compos personally, the decided weight of authority holds that the non compos is not liable.[34] The reasons given for the rule are that the non compos is not capable of appointing an agent, and the acts done by the purported agent are not authorized and are the individual acts of the purported agent or servant or are the acts of the guardian, where such agent or servant has been appointed by the guardian,[35] and the non compos is not liable for the acts of his guardian's servants.[36] A different rule applies where the tortious act occurs as an incident to the ownership of property. While there is authority to the contrary,[37] the weight of authority seems to hold that the non compos is liable for injury occurring from the negligent operation of property, or from failure to keep it in a safe condition, even where the injury was due to the negligence of a

[33] Gillet v. Shaw, 117 Md. 508, 83 A. 394, 42 L. R. A. (N. S.) 87.

[34] Gillet v. Shaw, 117 Md. 508, 83 A. 394, 42 L. R. A. (N. S.) 87; Ward v. Rogers, 51 Misc. Rep. 299, 100 N. Y. S. 1058.

[35] Gillet v. Shaw, 117 Md. 508, 83 A. 394, 42 L. R. A. (N. S.) 87.

[36] Ward v. Rogers, 51 Misc. Rep. 299, 100 N. Y. S. 1058; Gillet v. Shaw, 117 Md. 508, 83 A. 394, 42 L. R. A. (N. S.) 87.

[37] Rooney v. People's Trust Co., 61 Misc. Rep. 159, 114 N. Y. S. 612; Ward v. Rogers, 51 Misc. Rep. 299, 100 N. Y. S. 1058.

servant.[38] The reason given is that this class of liability is incident to the ownership and control of property not dependent upon the consent or intent of the owner, and there is no reason why a person without mind should not have the same responsibility in this respect as a normal person.[39]

§ 446. Liability of others for torts of non compos

The guardian or other custodian of a non compos is not liable for the torts committed by such ward,[40] unless the opportunity to commit the acts was due to want of reasonable care on the part of such guardian or custodian.[41] Where such custodian is an official in charge of an asylum or hospital, there is some question whether he is liable for the tortious acts of a non compos *negligently* discharged from such institution[42] unless there is evidence of malicious or corrupt conduct on the part of such official.[43] This is because the discharge of such persons is largely within the discretion of such official, and the exercise of such discretion cannot be questioned, in the absence of corrupt abuse of the same.[44] It is obvious that the insanity of the non compos should not be used as a cloak by others who have committed a tort. It is therefore the rule that, where others have in any way joined in the act, they are responsible, regardless of the in-

[38] Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423; Brinck v. Bradbury, 179 Cal. 376, 176 P. 690.

[39] Morain v. Devlin, 132 Mass. 87, 42 Am. Rep. 423.

[40] Rooney v. People's Trust Co., 61 Misc. Rep. 159, 114 N. Y. S. 612; Emery v. Littlejohn, 83 Wash. 334, 145 P. 423, Ann. Cas. 1915D, 767.

[41] Emery v. Littlejohn, 83 Wash. 334, 145 P. 423, Ann. Cas. 1915D, 767.

[42] Emery v. Littlejohn, 83 Wash. 334, 145 P. 423, Ann. Cas. 1915D, 767.

[43] Emery v. Littlejohn, 83 Wash. 334, 145 P. 423, Ann. Cas. 1915D, 767.

[44] Emery v. Littlejohn, 83 Wash. 334, 145 P. 423, Ann. Cas. 1915D, 767.

sanity of the non compos, and the fact that the unlawful acts were performed by him.[45]

§ 447. Liability of master for torts of insane servant

How far a master or principal will be responsible for the tortious acts of his insane servant or agent will depend largely on how far such master or principal can be charged with negligence with respect to the employment of the servant or agent. It is obvious that, if a person employs another which he knows, or should have known, is insane, or subject to fits of insanity, and places him in a position where he can injure others, the employer should in all reason be held liable for all damage which should occur to others through the incompetency of the employee, since such employer should have foreseen that such a person is likely to cause injury to others, and such have had more forethought for their welfare.[46]

[45] Tucker v. Hyatt, 151 Ind. 332, 51 N. E. 469, 44 L. R. A. 129.
[46] Christian v. Columbus & R. Ry. Co., 79 Ga. 460, 7 S. E. 216.

CHAPTER 14

CRIMINAL RESPONSIBILITY OF NON COMPOS

Sec.
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455. Insanity subsequent to verdict and sentence.
456. Degree of insanity.

§ 448. Criminal responsibility, in general

Insanity is considered, in the jurisprudence of all civilized nations, to be a defense against punishment for crime. It is usually set out among the recognized defenses in the Criminal Codes of the several states. The reason for allowing it as such a defense is obvious. One of the essential ingredients of crime is *intent*. Intent involves an exercise of the reasoning powers, in which the result of the criminal act is foreseen and clearly understood. Another essential element of crime is *animus*. Animus involves an exercise of reasoning powers, in which the result of the criminal act is recognized as being contrary to the rules of law and justice. If a person is mentally unsound, one or both of these elements may be, and usually are, wanting. An idiot may set fire to a house, without understanding that it will result in the destruction of the house, or that it is forbidden by law. In such case, there would be an absence of both *intent* and *animus*. A monomaniac may kill a man under the insane delusion that the man is an enemy who is about to kill him. Here there is an *intent,* as the monomaniac clearly understands that the act will result in the victim's death; but there is a lack of *animus,* because he believes that he is justified, and that the act, therefore, is right in the sight of the law. It is clear, then, that

where the mind of the perpetrator is so diseased as to exclude the presence of an intent or animus in the commission of the crime in question, he should not be punished as a criminal.[1] So closely has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English-speaking countries, that it has become a part of the fundamental laws thereof, to the extent that a statute which attempts to deprive a defendant of the right to plead it will be unconstitutional and void.[2]

§ 449. Criminal acts excused by insanity

The rule which exempts a non compos person from punishment for crime applies with equal force to all forms of crime made so by the laws of the forum, and is usually controlled by the Code or statutes of such place. Generally speaking, all acts usually denominated as crime under the rules of the common law come within the rule; e. g., homicide,[3] rape,[4] slander and libel,[5] theft,[6] fraud,[7] burglary,[8] etc.

§ 450. Degree of insanity necessary

The kinds and degrees of insanity which will afford a defense to prosecution for crime have been rather fully discussed in chapters 2 and 3 of the first division of this work. Various tests have been offered by the courts and text-writers, viz.: The "test

[1] Smith v. State, 55 Tex. Cr. R. 563, 117 S. W. 967; State v. Strasburg, 60 Wash. 106, 110 P. 1020, 32 L. R. A. (N. S.) 1216, Ann. Cas. 1912B, 917; State v. Brown, 36 Utah, 46, 102 P. 641, 24 L. R. A. (N. S.) 545; Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; 32 C. J. 750; Decennial and Other Key-Number Digests, tit. Criminal Law, ⇐47; 14 R. C. L. 598.

[2] State v. Strasburg, 60 Wash. 106, 110 P. 1020, 32 L. R. A. (N. S.) 1216, Ann. Cas. 1912B, 917.

[3] Sartin v. State, 51 Tex. Cr. R. 571, 103 S. W. 875.

[4] Lee v. State, 43 Tex. Cr. R. 285, 64 S. W. 1047.

[5] Kelley v. State, 51 Tex. Cr. R. 151, 101 S. W. 230.

[6] Lowe v. State, 44 Tex. Cr. R. 224, 70 S. W. 206.

[7] Holland v. State, 52 Tex. Cr. R. 160, 105 S. W. 812.

[8] Smith v. State, 55 Tex. Cr. R. 563, 117 S. W. 966

of a child of fourteen years," offered by Lord Hale, which is founded upon the common-law idea that a child of that age was incapable of committing felony;[9] the so-called "wild beast test," founded on the idea that, when one has no more understanding and memory than a wild beast, he ceases to have responsibility for acts ordinarily chargeable to intelligent beings;[10] and the "right and wrong test," announced by the English courts in the celebrated McNaughten's Case.[11] The last named alone has survived, and is the basis for the rule now established in the American courts, which requires that a defendant, in order to escape the consequences of his criminal act, establish that he did not have sufficient intelligence at the time of the commission of the act in question to distinguish between right and wrong with reference to that particular act.[12] The chief difficulty encountered in applying this test is in determining what is actually meant by such a one not being able to *distinguish between right and wrong.* It has been contended with some logic that persons could be so morally depraved that they could not appreciate that their criminal acts were wrong, and from this has arisen the very dangerous doctrine of "moral insanity,"[13] and a perverted idea of "irresistible impulse."[14] Of course, the recognition of such a doctrine would put a premium on moral depravity, and place society at the mercy of the vicious and the criminally inclined. To meet this, the courts have evolved the rule that the inability to understand and appreciate the right and wrong of a matter must arise from mental weakness, or disease of the mind such as will ren-

[9] State v. Marler, 2 Ala. 43, 36 Am. Dec. 402.

[10] Rex v. Arnold, 16 How. St. Tr. 695; State v. Marler, 2 Ala. 43, 36 Am. Dec. 403.

[11] 1 Car. & K. 130, note 134; 47 E. C. L. 129, note; 10 Cl. & F. 200; 8 Eng. Reprint, 718.

[12] 16 C. J. 100; State v. James, 96 N. J. Law, 132, 114 A. 553, 16 A. L. R. 1154; State v. Cooper, 170 N. C. 719, 87 S. E. 50, 8 A. L. R. 1214; Decennial and Other Key-Number Digests, tit. Criminal Law, ⚿48.

[13] Supra, § 68 et seq.

[14] Supra, § 75 et seq.

der the person in question incapable of understanding and appreciating the consequences of his act, resist the promptings of the impulse to commit it, or which rendered him incapable of understanding that the act in question is forbidden by law. In other words, his mental, as distinguished from his moral, faculties must be so affected as to destroy his freedom of action with reference to the matter in question.[15]

The "right and wrong" test has been adopted by statutory enactment in a number of the American states, notably in the state of Oklahoma,[16] and, where not adopted by statute, it has with few exceptions found recognition in courts of most jurisdictions in the United States.

§ 451. Insanity at time of commission of crime

Where the condition of insanity exists at the time of the commission of a crime, it constitutes a defense to the crime in question. Where insanity is established in such case, it is a complete defense to the criminal charge, and the non compos is as fully exonerated in the eyes of the law as if the offense had not been committed.[17] Where he has recovered since the commission of the act, he is entitled to go free; but, where the insanity still exists to the extent that he might be a danger to his fellows, he should be committed to an aslyum or have other proper form of restraint. Where it is established that the mental incapacity existed at the actual time of the commission of the act which is sought to be excused, it is immaterial that it existed but a short

[15] Supra, §§ 16, 73; Rogers v. State, 128 Ga. 67, 57 S. E. 227, 10 L. R. A. (N. S.) 999, 119 Am. St. Rep. 364; Carter v. State, 2 Ga. App. 254, 58 S. E. 532.

[16] Marshall v. Territory, 2 Okl. Cr. 136, 101 P. 139; Roe v. State, 17 Okl. Cr. 587, 191 P. 1048; Agent v. State, 18 Okl. Cr. 281, 194 P. 233.

[17] Supra, § 448; Com. v. Wireback, 190 Pa. 138, 42 A. 542, 70 Am. St. Rep. 625; Sage v. State, 91 Ind. 141; Fritz v. State, 178 Ind. 463, 99 N. E. 727; People v. Kelley, 7 Cal. App. 554, 95 P. 45.

time, or that the accused recovered quickly thereafter;[18] the question to be decided is his actual mental condition at the time of the commission of the purported crime. Evidence of insanity before or after that time is only relevant as tending to show insanity existing at the time of the commission of the offense.[19] Nor is it material what form the insanity takes, or how it was produced, so long as it is actual and meets the test discussed supra.[20]

The courts of one of the states hold that a person cannot plead insanity brought about by a blow received in a difficulty voluntarily entered into,[21] since the person would be pleading as excuse a condition brought about by his own act in the first instance; but this rule is unique, and is not followed in any decision of another state, so far as we can find.[22]

§ 452. Insanity subsequent to crime

Where the person becomes insane after the commission of the crime, the effect is different. While such subsequent insanity acts as a stay of punishment, and usually of trial as well, it does not excuse the crime or exempt from guilt.[23] At common law a person could not be tried while he was insane, because his helpless condition rendered him incapable of making a proper de-

[18] Duthey v. State, 131 Wis. 178, 111 N. W. 222, 10 L. R. A. (N. S.) 1032; Knights v. State, 58 Neb. 225, 78 N. W. 508, 76 Am. St. Rep. 85.

[19] Shultz v. State, 13 Tex. 401; People v. Kirby, 15 Cal. App. 264, 114 P. 794; Cochran v. State, 65 Fla. 91, 61 So. 187; Carter v. State, 2 Ga. App. 254, 58 S. E. 532.

[20] See § 450.

[21] State v. Coyle, 86 S. C. 81, 67 S. E. 24, 138 Am. St. Rep. 1022 (see note).

[22] Duthey v. State, 131 Wis. 178, 111 N. W. 222, 10 L. R. A. (N. S.) 1033; 16 C. J. 98.

[23] Jones v. State, 13 Ala. 153; In re Buchanan, 129 Cal. 330, 61 P. 1120, 50 L. R. A. 378; State v. Prichett, 106 N. C. 667, 11 S. E. 357; In re Kidd, Petitioner, 40 Kan. 644, 20 P. 526; People v. Kirby, 15 Cal. App. 264, 114 P. 794.

fense; and this is the rule in the American states,[24] where the procedure in such case is usually regulated by the Criminal Codes of the respective states. It is usually determined in a preliminary proceeding, based on suggestion of counsel or other information that the accused is insane. In such case, the verdict of guilty may be received and the judgment suspended during the insanity of the accused,[25] but such procedure is not usual. The general practice is that, where the defendant is found to be insane, the trial is stopped pending the prisoner's recovery,[26] and, until he does recover, the prisoner may be remanded to an asylum or other proper form of restraint.

§ 453. Raising issue subsequent to conviction

Where the issue has not been raised upon the trial, but it is desired to raise it subsequent to conviction, the procedure is not uniform, and depends largely upon the local codes of the states. In the states where a writ of error coram nobis is recognized, that proceeding may be employed.[27] Where such proceedings are not recognized, it would seem that the question may be raised on motion for new trial,[28] a motion in arrest of judgment,[29] or on appeal and error, where the question of insanity is sufficiently shown by the record.[30]

[24] Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; see 38 L. R. A. 577.

[25] Com. v. Endrukat, 35 Pa. Co. Ct. R. 571.

[26] Youtsey v. U. S., 97 F. 937, 38 C. C. A. 562; State v. Reed, 41 La. Ann. 581, 7 So. 132; Gruber v. State, 3 W. Va. 699; Holland v. State, 52 Tex. Cr. R. 160, 105 S. W. 812.

[27] Hawie v. State, 121 Miss. 197, 83 So. 158, 10 A. L. R. 205; Johnson v. State, 97 Ark. 131, 133 S. W. 596.

[28] U. S. v. Lancaster, 7 Biss. 440, Fed. Cas. No. 15,555; Smith v. Com., 129 Ky. 433, 112 S. W. 615; Green v. State, 88 Tenn. 614, 14 S. W. 430.

[29] Marshall v. Territory, 2 Okl. Cr. 136, 101 P. 139; State v. Brinyea, 5 Ala. 241; Ince v. State, 77 Ark. 418, 88 S. W. 818.

[30] Guagando v. State, 41 Tex. 626; People v. West, 25 Cal. App. 369, 143 P. 793; State v. Reed, 41 La. 581, 7 So. 132.

§ 454. Proceedings subsequent to acquittal on insanity plea

As we have seen above, the plea of insanity at the time of the purported crime is not a mitigation, but is in fact a complete defense, to the alleged crime; and, where the plea is sustained, the defendant stands acquitted in all respects as if the crime had never been committed. Where he has recovered his sanity at the time of the acquittal, he is entitled to go at large;[31] and statutes providing that a person acquitted on the ground of insanity may be sentenced by the court, without further hearing, to an asylum, or that the court may in its discretion commit such person to a hospital for the insane, etc., have uniformly been held unconstitutional, as tending to deprive such person of liberty without due process of law.[32] In other words, the commitment must not be arbitrary, and the accused must be given opportunity for a constitutional hearing to determine his right to go free. But a person so acquitted may be reasonably restrained, as one prima facie unfit to go at large, so long as reasonable opportunity is given for a hearing on the right to go free.[33] The courts are not disposed to hold lightly the verdict of a jury acquitting a person on the grounds of insanity, and such verdict will be prima facie evidence of his insanity in any subsequent proceedings to recover his liberty,[34] since insanity, once shown to exist, will be presumed to continue until the contrary is shown.[35] It is usual, therefore, for the court, upon acquittal

[31] In re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729.

[32] Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633; In re Boyett, 136 N. C. 415, 48 S. E. 789, 67 L. R. A. 972, 103 Am. St. Rep. 944, 1 Ann. Cas. 729, note; 43 Am. St. Rep. 540, note.

[33] See note 32, supra.

[34] Clearfield County v. Cameron Tp. Poor Dist., 135 Pa. 86, 19 A 952.

[35] In re Brown, 39 Wash. 160, 81 P. 552, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868, 4 Ann. Cas. 488; Decennial and Other Key-Number Digests, tit. Insurance, ⇐⇒86. See ante, § 525.

of a person on the ground of insanity, to remand the defendant to custody and confinement as a non compos who might be dangerous if allowed to go at large, where it reasonably appears on due hearing that he is still suffering from the mental disorder;[36] and statutes providing for such detention have been held to be constitutional.[37] The question in such case is that of the public safety, coupled with reasonable opportunity to the accused to establish his sanity and right to go at large; and where it appears that the prisoner is insane and dangerous, he will be remanded to an asylum, although his insanity is periodical, and his spells of mental disturbance only come at irregular intervals.[38] It will not be allowed him to assert insanity to escape the consequence of his acts, and then deny his own plea in order to escape confinement, as such conduct would be inconsistent and repugnant to the spirit of the law. The verdict of the jury, or finding of the court, on the subject of insanity, is conclusive, and cannot subsequently be inquired into.[39] The defendant must show in such case that, while he was insane at the time of the commission of the offense, he had recovered his reason subsequent thereto, and can safely be allowed to go at large.[40]

§ 455. Insanity subsequent to verdict and sentence

Where the defendant in a criminal trial is found to be insane subsequent to trial, verdict and sentence, the insanity has the effect of suspending further procedure. If it occurs subsequent

[36] Clearfield County v. Cameron Tp. Poor Dist., 135 Pa. 86, 19 A. 952; Gleason v. Inhabitants of West Boylston, 136 Mass. 489.

[37] Ex parte Brown, 39 Wash. 160, 81 P. 552, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868, 4 Ann. Cas. 488; Ex parte Clark, 86 Kan. 543, 121 P. 494, 39 L. R. A. (N. S.) 680, Ann. Cas. 1913C, 317. See chapter 6.

[38] Caffey v. State, 78 Miss. 645, 29 So. 396.

[39] Com. v. Bennet, 15 Wkly. Notes Cas. (Pa.) 515.

[40] Com. v. Bennet, 15 Wkly. Notes Cas. (Pa.) 515.

to the trial and verdict, and before sentence, no sentence can be pronounced against the defendant while he is in such condition, not only because it cannot be carried out, but because he would not be able to understand the nature and import of the proceedings, and would not be able to intelligently answer whether there was any reason, as there might be, why judgment should not be pronounced.[41] Where the insanity is found after the accused has been tried and convicted, and sentence has been pronounced, the sentence cannot be carried into effect, as punishment inflicted under the circumstances could not have the result for which it is imposed, viz., the reform of the criminal and the determent of others from the commission of like acts. Punishment inflicted under such circumstances could not likely work a reformation of one who did not understand the purpose of the punishment; and the inflicting of punishment upon such a person would more likely excite sympathy than serve as an example to deter others.[42] Of course, upon such a finding of insanity, the defendant should be remitted to confinement as circumstances may require.[43] This is almost always regulated by statute, and provision is made for commitment of insane prisoners to public asylums provided for the criminally insane. However, the suggestion of insanity after conviction is addressed very largely to the discretion of the court, and the appellate courts are not inclined to interfere where the right to a hearing on the subject is denied, and it is not looked upon, in such case, as a right, and the defendant is not considered as being deprived of

[41] State v. Helm, 69 Ark. 167, 61 S. W. 915; Bonds v. State, Mart. & Y. (Tenn.) 143, 17 Am. Dec. 795; State v. Reed, 41 La. Ann. 581, 7 So. 132; Lermo v. State (Tex. Cr. App.) 68 S. W. 684; Nobles v. Georgia, 168 U. S. 398, 18 S. Ct. 87, 42 L. Ed. 515; 4 Bl. Com. 395.

[42] Nobles v. Georgia, 168 U. S. 398, 18 S. Ct. 87, 42 L. Ed. 515; Lermo v. State (Tex. Cr. App.) 68 S. W. 684; Green v. State, 88 Tenn. 634, 14 S. W. 489; 1 Chitty, Cr. Law, 761; Decennial and Other Key-Number Digests, tit. Criminal Law, ⟸981.

[43] State v. Prichett, 106 N. C. 667, 11 S. E. 357; Stone v. Conrad, 105 Iowa, 21, 74 N. W. 910; 1 Chitty, Cr. Law, 649, 762.

his constitutional rights by a denial thereof.[44] This being true, a writ of habeas corpus cannot be used to secure such a hearing.[45]

§ 456. Degree of insanity

Where the question of the accused's insanity subsequent to trial and conviction has been raised, the test usually applied is whether such convict has sufficient intelligence to understand the nature of the proceedings against him, what he has been tried for, the purpose of the punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and sufficient mind to convey such information to the court or his attorneys.[46] The intention of the law is not to execute sentence against one who is mentally incapable of knowing that he is being punished, and why he is being punished, and one who cannot offer any valid reason why such punishment should be stayed, should such reason exist.

[44] Nobles v. Georgia, 168 U. S. 398, 18 S. Ct. 87, 42 L. Ed. 515; Lermo v. State (Tex. Cr. App.) 68 S. W. 684; State v. Lyons, 113 La. 959, 37 So. 903; In re Smith, 25 N. M. 48, 176 P. 819, 3 A. L. R. 83.

[45] Ex parte State ex rel. Attorney General, 150 Ala. 489, 43 So. 492, 10 L. R. A. (N. S.) 1129, 124 Am. St. Rep. 79.

[46] State v. Smith, 25 N. M. 48, 176 P. 819, 3 A. L. R. 83.

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CHAPTER 15

WITH RESPECT TO THE RIGHT TO DEMISE

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§ 457. Right to demise, in general

Closely related to property rights, and to the right of contracting with reference thereto, is the right to demise or dispose of the same by will. It is in reality but a form of conveyance, passing the title of the property from the testator to the legatee, and involves an exercise of the reasoning powers in understanding the nature of the transaction, in keeping in the mind the identity of the property to be demised, and in selecting the donee or the legatee. Inasmuch as the exercise of the faculties consists largely of a matter of recognition and selection, without much consideration being given to the benefits to be derived (that is to say, the mental effort used is largely passive in its nature), it does not require as high a degree of intelligence as is ordinarily required for entering into contractual relations, where the benefits derived are a large part of the moving force inducing the conveyance, and where there is more or less of a pull and combativeness between the minds of the grantor and the

grantee, each seeking to obtain the best terms possible for himself.[1] Also the degree of intelligence is governed by the conditions surrounding the testator at the time of the making of the will in question, viz.: Whether the testamentary act was purely voluntary, or was influenced by the acts of another, as we shall see hereafter under the head of undue influence.[2] Again, the amount of intelligence required depends very much upon the amount and extent of the estate which is to be disposed of, the number and closeness of the devisees, and the nature of the will itself.[3] It is evident that it will require a much smaller degree of intelligence to dispose of a few and simple possessions to one or a few familiarly known relatives by a short and simply worded will than it will be to dispose of a vast, complex estate to a number of distantly related persons by a long will, with a more or less complicated scheme of disbursement.[4]

While these facts have tended to afford some aid in attempts to reconcile the various expressions used by the courts in attempting to arrive at some definite rule by which to measure the intelligence to be required of a testator, yet the views are not uniform, and two general rules have grown up. Under the first of these rules, which we will term the American rule, the testator's capacity is measured, not by his general capacity to make a will, but by his capacity to make the particular will in question.[5] As opposed to this stands what we will term the New York

[1] Dunhand's Appeal, 27 Conn. 192; Hall v. Dougherty, 5 Houst. (Del.) 435; Barnhardt v. Smith, 86 N. C. 473; Kramer v. Weinert, 81 Ala. 414, 1 So. 26; Brinkman v. Rueggesick, 71 Mo. 553; Havens v. Mason, 78 Conn. 410, 62 A. 615, 3 L. R. A. (N. S.) 172.

[2] See ante, § 462.

[3] Dillman v. McDanel, 222 Ill. 276, 78 N. E. 591, 113 Am. St. Rep. 400; Trish v. Newell, 62 Ill. 196, 14 Am. Rep. 79; Silverthorn's Will, 68 Wis. 372, 32 N. W. 287; Campbell v. Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167.

[4] Sheldon v. Dow, 1 Dem. Sur. (N. Y.) 503; In re Silverthorn, 68 Wis. 372, 32 N. W. 287.

[5] Campbell v. Campbell, 130 Ill. 466, 22 N. E. 620, 6 L. R. A. 167; Garner, Wills, p. 104.

rule, which undertakes to measure the testator's capacity by his general capacity to make a will, without reference to the particular will in question. The first rule seems to be the general rule in the American states, and the second rule is followed by the courts of New York and Maine.[6]

§ 458. Measure of mental capacity

Out of the multitude of authorities on the question, the rule has been evolved that, at the time of the making of the will, the testator must have sufficient mental capacity to know and understand the nature of the act he is engaged in, the general nature and situation of his property, and those persons who naturally have a claim upon his bounty.[7] Upon a close reading of the authorities, four points will be evident as running through practically all leading authorities and as combining to constitute the general rule for measuring the capacity of a testator, viz.:

First. It is not required that the testator have *actual knowledge* of the facts necessary to qualify him to make a will. It is only required that he have capacity to know such facts. It not infrequently happens that persons in the full vigor of their intelligence do not actually know the full extent of their possessions, where such possessions are large, or where all their relations are, and whether these are still alive, especially where such relations are numerous and scattered. Hence it would not be reasonable to require this of one whose intelligence is below the normal.[8]

[6] Delafield v. Parish, 25 N. Y. 9; Buchanan v. Belsey, 65 App. Div. 58, 72 N. Y. S. 601; In re American Board of Com'rs for Foreign Missions, 102 Me. 72, 66 A. 215.

[7] Havens v. Mason, 78 Conn. 410, 62 A. 615, 3 L. R. A. (N. S.) 172; Trezevant v. Rains (Tex. Sup.) 19 S. W. 567; Brown v. Mitchel, 88 Tex. 350, 31 S. W. 625, 36 L. R. A. 64. See 38 L. R. A. 722, 732; 39 L. R. A. 309; 27 L. R. A. (N. S.) 1.

[8] Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827; Brown v. Mitchell, 75 Tex. 9, 12 S. W. 606; Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; Hanrahan v.

Second. The testator must have *capacity* to understand in a general way the fact that the act he is engaged in is a devise of his property. This follows as a matter of course. No man should be bound by an act he has no intention of performing, or which is done unintentionally, unless the circumstances estop him from denying it, and no one can intend to do a thing without first being conscious of what he is doing and the fact that he is doing it. Therefore he can act with no degree of intelligence unless he knows the nature of the instrument he is executing. This is true with reference to all forms of contracts, and is especially true with reference to the execution of wills, where there must be a rational desire on the part of the testator to make a devise.[9]

Third. He must have the *capacity* to understand in a general way the nature and position of his property. This applies with equal force to real and personal property.[10] It does not necessarily mean that the testator must have a distinct recollection of all of his property, since, as we have noted supra, persons of large means might not be able to meet the requirement in cases where their sanity was called into question in the making of a will.[11] A general *ability* to understand is all that is required.

Fourth. The testator must be able to bear in mind, or memory, at the time of the making of his will, those naturally entitled to his consideration in the distribution of his estate.[12] A will, unlike most other conveyances, is founded upon no inducement mov-

O'Toole, 139 Iowa, 229, 117 N. W. 675; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 11.

[9] Newcomb's Ex'r v. Newcomb, 96 Ky. 120, 27 S. W. 997; 27 L. R. A. (N. S.) 14; Beach, Wills, § 97.

[10] Sloan v. Maxwell, 3 N. J. Eq. (2 Green, Ch.) 563, 566; Winchester's Case, 6 Coke, 23; 27 L. R. A. (N. S.) 11–18.

[11] Whitney v. Twombly, 136 Mass. 145.

[12] Burney v. Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33; Blough v. Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; Bean v. Bean, 144 Mich. 599, 108 N. W. 369; Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395, 118 Am. St. Rep. 266; 27 L. R. A. (N. S.) 47 et seq., 91 et seq.

ing to the transfer as a quid pro quo. It is merely the exercise of the right, by one who is about to lose all future control over his earthly possessions, to designate who is to be his successor in their control and enjoyment. At death, the right of property ceases, and it is only the policy of society, which wishes to avoid the confusion that would arise if the property was thrown back into the common fund without a recognized holder, that gives the dying owner the right to designate his successor in property rights. While the right of primogeniture is no longer recognized, yet its principle lingers in the hearts of the masses; and those closely related to the testator, or to whom he owes a certain duty of care and protection, naturally have a right to expect that his property should come to them rather than to a stranger, unless there is a substantial reason to the contrary. As it is also the natural tendency of the normal man to give preference to those connected with him by ties of kinship, the law requires that the testator have sufficient mental capacity to bear such persons in his memory and give consideration to their identity and claim. If his mind is so weak and his memory so wandering that he cannot do this, there is a lack of testamentary capacity.[13] Unfounded dislikes, prejudices, jealousies, great eccentricities, etc., will not of themselves be sufficient to show lack of testamentary capacity on the part of the testator,[14] though such facts may be introduced along with other facts as evidence tending to show mental unsoundness.[15] Capacity to contract has sometimes been used as a standard to test the capacity of a testator, but it is now generally held that such a standard is erroneous.[16] While contractual capacity includes testamentary capacity, yet, as we have seen supra, one may have testamentary

[13] 27 L. R. A. (N. S.) 46; Gardner, Wills, p. 100; Decennial and Other Key-No. Digests, Wills, ⇐50.

[14] Gardner, Wills, pp. 119, 122; Beach, Wills, § 102; 28 R. C. L. pp. 89, 106, 108.

[15] Beach, Wills, §§ 103, 104.

[16] Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; 27 L. R. A. (N. S.) 54; Ann. Cas. 1915A, 362.

capacity without having contractual capacity. As a rule it takes much less strength of mind to passively direct a distribution of property than it does to affirmatively negotiate the terms of a contract.[17] But it has been held improper to charge the jury to this effect, since a jury is not supposed to know the degree of insanity or strength of mind required to make a contract in the first place, and such an instruction might be very misleading and confusing to them.[18]

§ 459. Derangement as to subject-matter

The mere fact of a testator being insane will not affect his capacity to make a will, unless such mental unsoundness affects his capacity to meet the test of testamentary capacity, or, in other words, unless the insanity extends to the subject of the will itself.[19] He may be violently insane on one or more subjects, and yet be entirely sane on the subjects relating to the making of his will. This condition has already been discussed in a general way under the head of monomania and temporary insanity, supra. This has not always been the rule, as it was at one time the theory under the common law in England that the mind of a man was indivisible, and a derangement of one part was a derangement of the whole. It held that there were no degrees in insanity, and the slightest insanity, if pronounced, was sufficient to deprive a testator of testamentary capacity, whether it influenced the mak-

[17] Prather v. McClelland, 76 Tex. 574, 13 S. W. 543; 27 L. R. A. (N. S.) 53; Gardner, Wills, p. 105; Beach, Wills, § 101.

[18] Brown v. Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64.

[19] Jinkins v. Morris, L. R. 14 Ch. Div. 674; In re Kendrick, 130 Cal. 360, 62 P. 605; Smee v. Smee, L. R. 5 Prob. Div. 84; Lozear v. Shields, 23 N. J. Eq. 509; Middleditch et al. v. Williams, 45 N. J. Eq. 726, 17 A. 826, 4 L. R. A. 738; Dunham's Appeal, 27 Conn. 192; James v. Langdon, 7 B. Mon. (Ky.) 193; Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422; Whitney v. Twombly, 136 Mass. 145; Rice v. Rice, 50 Mich. 448, 15 N. W. 545; Cole's Will, 49 Wis. 179, 5 N. W. 346; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; 27 L. R. A. (N. S.) 33 et seq.

ing of the will or not.[20] It is interesting to note the rule and the reasons therefor as stated by the Chief Justice of the Queen's Bench as follows: "To constitute testamentary capacity, soundness of the mind is indispensably necessary. But the mind, through its various faculties, if it labors under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, cannot be said to be sound. Such a mind is unsound, and testamentary incapacity is the necessary consequence." [21] This rule was changed in the case of Bank v. Goodfellow,[22] and the rule in both England and the United States now is as above indicated.[23] This is an example of how advanced knowledge in the realm of mental phenomena has changed and simplified the rules of law from time to time.

§ 460. Apparently unfounded beliefs—Effect of

As corollary to the rule discussed in the above paragraph, it is held that strange and generally unaccepted beliefs and ideas, bordering on monomania, will not of themselves destroy testamentary capacity. For example, it is held that a belief in spiritualism is not an insane delusion, such as will affect testamentary capacity,[24] except, perhaps, where it directly influences the making of a will contrary to what the testator would otherwise have made, as, for example, where the testator thinks he has been prompted by creatures of the spiritual world. Similarly, belief in witchcraft is not necessarily destructive of testamentary capacity,[25] although, in this age, it is a strong circum-

[20] Warring v. Warring, 6 Moore, P. C. 341, 12 Jur. 949.

[21] Bank v. Goodfellow, L. R. 5 Q. B. 549.

[22] L. R. 5 Q. B. 549.

[23] See supra, note 19.

[24] 16 L. R. A. 677. See infra, note 29; Gardner, Wills, p. 122.

[25] Schildnecht v. Rompf's Ex'x (Ky.) 4 S. W. 235; Leach v. Leach, 4 Am. Law J. (N. S.) 179; Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81; Kelly v. Miller, 39 Miss. 19; In re Vedder, 6 Dem. Sur. (N. Y.) 92; Chaplin, Wills, 76.

stance pointing to insanity.[26] So a belief in metempsychosis,[27] mesmerism, clairvoyance, magic, diabolical visitations, peculiar beliefs of future existence, and other radical and seemingly foolish ideas will not operate to avoid a will made by a person entertaining them, unless it is shown that such ideas amount to insane delusions, and as such directly affect the disposition of the property mentioned in the will.[28] The most controverted of these is the effect of a belief in spiritualism. It is generally held, as we have indicated, that a mere belief in spiritualism is not an insane delusion, and will not ordinarily avoid a will made by a believer therein.[29] But this will not be true where it is shown that such belief in spiritualism influenced the maker of a will to make a demise of his property materially different from what he would otherwise have made. For example, it has been held that when a testator, through fear, dread, or reverence for the supposed spirits of the dead, which he believes himself to be in communication with, suffers his free will and judgment to be overcome, so that he disposed of his property under the direction of the supposed spirits, the will so made may be set aside as made by an insane person.[30]

[26] Kelly v. Miller, 39 Miss. 17; Lee's Heirs v. Lee's Ex'r, 4 McCord (S. C.) 183, 17 Am. Dec. 722.

[27] In re Bonard's Will (N. Y.) 16 Abb. Prac. (N. S.) 128.

[28] Denson v. Beazley, 34 Tex. 191; Thompson v. Quimby, 2 Bradf. (N. Y.) 449; Thompson v. Thompson, 21 Barb. (N. Y.) 107; Turner v. Hand, Fed. Cas. No. 14,257, 3 Wall. Jr. 88, 120; In re Sammon's Will, 4 Dem. Sur. (N. Y.) 507. 27 L. R. A. (N. S.) 56 et seq.

[29] McClary v. Stull, 44 Neb. 175, 62 N. W. 501; In re Smith's Will, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. St. Rep. 756; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Otto v. Doty, 61 Iowa, 23, 15 N. W. 578; Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422; 16 L. R. A. 677; Middleditch v. Williams, 45 N. J. Eq. 726, 17 A. 826, 4 L. R. A. 738.

[30] Thompson v. Hawks, 14 F. 906.

§ 461. Effect of adjudication of insanity

That a person has been adjudged incompetent from a mental derangement and placed under guardianship is not necessarily conclusive of his competency to make a will. While such an adjudication of insanity is prima facie as against third parties not a party to the proceeding, yet it is generally held that the fact that a person making a will is under guardianship will not be conclusive of his testamentary incapacity, since a person may be incapable of handling his property and affairs, and yet be mentally capable of disposing of his property by will.[31] Moreover, the will might have been made during a lucid interval, even where the insanity entirely clouds the mind for the time.[32] This is true, even where the testator is confined in an asylum, and where the insanity is not shown to have affected his testamentary capacity.[33]

§ 462. Undue influence as affected by

The degree of insanity required to deprive a testator of testamentary capacity is frequently affected by conditions surrounding him at the time of the making of the will, and which amount to a coercion of his freedom of action in the making of the same. Such pressure, brought to bear by a person or persons who use their close relation to the testator to influence his action with respect to the demise of his property, is known in law as *undue* influence. Undue influence savors of fraud, and sometimes shades into it. For convenience in distinguishing the two, we will say fraud may be defined as a deception practiced upon the minds of ordinary strength, while undue influence is overreaching persuasion, practiced upon the mind, more or less affected and weakened by age, disease, or other causes.

[31] Slinger's Will, 72 Wis. 22, 37 N. W. 236; In re Cowdry's Will, 77 Vt. 359, 60 A. 141, 3 Ann. Cas. 70; Rice v. Rice, 50 Mich. 448, 15 N. W. 545.

[32] Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691.

[33] Draper's Estate, 215 Pa. 314, 64 A. 520.

§ 463. What constitutes undue influence

As indicated supra, undue influence involves a subversion of the will of the person upon whom it is practiced. To constitute it, there must be something more than a mere influencing by appealing to the reason, pity, sympathy, gratitude, or any of the other emotions of man's nature, or by the use of flattery, without coercing or deceiving a weaker intellect;[34] there must be some act on the part of the person exercising the influence tending to take away the freedom of action or power of judgment on the person influenced.[35] Mere opportunity to exercise such influence, or even the attempted existence of such influence, will not be sufficient, unless it is shown to have been exercised;[36] but the existence of relations making such influence possible may be taken, along with other facts, as a strong circumstance tending to establish undue influence.[37]

[34] Robinson v. Stuart, 73 Tex. 267, 11 S. W. 275; Bevelot v. Lestrade, 153 Ill. 625, 38 N. E. 1056; Bundy v. McKnight, 48 Ind. 503, 516, 518; Tyler v. Gardiner, 35 N. Y. 559; Appeal of Turner, 72 Conn. 305, 44 A. 310; Tucker v. Field, 5 Redf. Sur. (N. Y.) 139; McCulloch v. Campbell, 49 Ark. 367, 5 S. W. 590; Barlow v. Waters, 28 S. W. 785, 16 Ky. Law Rep. 426.

[35] Patterson v. Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98; Brown v. Mitchell, 75 Tex. 9, 12 S. W. 606; Bush v. Lisle, 89 Ky. 393, 12 S. W. 762; Middleditch v. Williams, 45 N. J. Eq. 726, 17 A. 826, 4 L. R. A. 738; Tyler v. Gardiner, 35 N. Y. 559; Chaplin, Wills, 99–103; 4 L. R. A. 639, 640, note; Boyse v. Rossborough, 6 H. L. Cas. 6.

[36] In re Shell's Estate, 28 Colo. 187, 63 P. 413, 53 L. R. A. 378, 89 Am. St. Rep. 181; Sunderland v. Hood, 84 Mo. 293; Brown v. Mitchell, 75 Tex. 626, 12 S. W. 606; In re Black's Estate, 132 Cal. 392, 64 P. 695; Schuchhardt v. Schuchhardt, 62 N. J. Eq. 710, 49 A. 485; Dean v. Negley, 41 Pa. 317, 80 Am. Dec. 620; Mason v. Williams, 52 Hun, 398, 6 N. Y. S. 479.

[37] Sunderland v. Hood, 84 Mo. 293; Main v. Ryder, 84 Pa. 217; Farr v. Thompson, Cheves (S. C.) 37; Treazevant v. Rains (Tex. Sup.) 19 S. W. 567.

§ 464. Doctrine of lucid interval

There are times, in certain cases, when the curtain of madness which has been dropped over the insane person's intellect lifts temporarily, and the mind for an interval, or a series of intervals, returns to something like its normal condition. Such periods are known as *lucid intervals.* It therefore sometimes happens that persons ordinarily without testamentary capacity have their testamentary capacity restored to them for a time, and, where a will is executed during such a lucid interval, it has been held sufficient to give testamentary capacity.[38] For this reason, as we have seen supra, the proof of testamentary capacity is, usually, confined to the time of the making of the will in question; in other words, it must be shown that the testator had capacity to make a will at the time he made the will under inquiry, and not that he had general capacity to make a will.[39] The contrary rule seems to be held in New York and Maine.[40] While there is authority to the effect that a will regular and reasonable on its face will be presumed to have been made in a lucid interval, since men are generally presumed to be sane,[41] yet we think that the better rule, as well as the decided weight of authority, holds that, where general or permanent insanity is shown prior to and about the time of the making of a will, the burden will be upon the opposite party to show that the will was actually made during a lucid interval.[42] The presumption of the con-

[38] Gardner, Wills, p. 126; Beard, Wills, § 98; Wright v. Lewis, 5 Rich. S. C. 212, 55 Am. Dec. 714; Bey's Succession, 46 La. Ann. 773, 15 So. 297, 24 L. R. A. 577.

[39] See supra, § 457.

[40] See supra, § 457, note 6.

[41] Kingsbury v. Whitaker, 32 La. Ann. 1055, 36 Am. Rep. 278.

[42] Keely v. Moore, 196 U. S. 38, 25 S. Ct. 169, 49 L. Ed. 376; Taylor v. Trich, 165 Pa. 586, 30 A. 1053, 44 Am. St. Rep. 679; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Clark v. Fisher, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; In re Murphy, 43 Mont. 353, 116 P. 1004, Ann. Cas. 1912C, 388; Beard, Wills, § 98; O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322.

tinuance of insanity, once shown to exist in a permanent form, will overcome the general presumption of sanity. Proof of subsequent insanity will not have this effect, as it raises no presumption of insanity prior to that time;[43] nor will proof of slight or temporary insanity, or mental derangement from accident or illness likely transitory in character, existing prior to the making of the will, be sufficient of itself to overcome the presumption of sanity and show absence of testamentary capacity.[44]

§ 465. Drunkenness—Effect on testamentary capacity

With respect to its effect upon testamentary capacity, drunkenness is considered in the light of insanity. As aptly expressed by one of the early writers on the subject: "He that is overcome by drink, during the time of his drunkenness is compared to a madman, and therefore, if he make his testament at that time, it is void in law, which is to be understood, when he is so excessively drunk that he is utterly deprived of the use of his reason and understanding, otherwise, albeit his understanding is obscured, and his memory troubled, yet he may make his testament, being in that case." [45] It follows that, where the mind is so clouded by drink, at the time the will is made, that the testator cannot meet the test of testamentary capacity, as set out supra, the will is without force to the same extent as if the testator were insane.[46] But since intoxication is transitory in its effect, and is not continuous, as in the case of a mental derangement arising from a chronic affection of the mind, as in the case of insanity, the intoxication must be shown to exist at the

[43] In re Dolbeer's Estate, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795.

[44] Trish v. Newell, 62 Ill. 196, 14 Am. Rep. 79; Keely v. Moore, 196 U. S. 38, 25 S. Ct. 169, 49 L. Ed. 376; In re Ayers' Estate, 84 Neb. 16, 120 N. W. 491; O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322.

[45] Swinburne, pt. 2, § 6.

[46] Andress v. Weller, 3 N. J. Eq. (2 Green Ch.) 604; Black v. Ellis, 3 Hill (S. C.) 68; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; Bannister v. Jackson, 45 N. J. Eq. 702, 17 A. 692; Mechem's Cases on Succession, p. 19.

actual time of making the will, and to the extent that it actually deprives the mind of capacity to make the will. The mere fact that one is a habitual drunkard, and that he was even drunk at the time of the making of the will, is not sufficient to show incompetency, or raise a presumption of a lack of testamentary incapacity.[47] But where the intemperance has proceeded so far as to have become settled alcoholic insanity, or delirium tremens, the same rule would apply as in ordinary insanity.[48] But evidence of the habitual use of intoxicants may be shown, either as a circumstance tending to show intoxication at the time of the making of the will or as tending to show insanity resulting from the continuous use of liquor, as it has been held to be a matter of common knowledge that its habitual use will tend to impair the faculties of the mind as well as the body.[49] Where the maker of a will has been declared a habitual drunkard under the state statutes relating to incompetents, and placed under guardianship, or in some place of restraint, the rule is not so clear. We are inclined to think, however, that the effect of such an adjudication will be to fix the status of the testator as prima facie incompetent, and it will devolve upon the person seeking to establish the will to show the mental competency of the maker.[50]

§ 466. Drugs—Effect on testamentary capacity

The rules of law with reference to measuring the effect of drugs upon the mind of a testator follow very closely after those relating to intoxicating liquors. Such habitual use will not of

[47] Stebbins v. Hart, 4 Dem. Sur. (N. Y.) 501; In re Peck's Will, 62 Hun, 622, 17 N. Y. S. 248; Appeal of Harmony Lodge, I. O. O. F., No. 16, 127 Pa. 269, 18 A. 10; Fluck v. Rea, 51 N. J. Eq. 233, 27 A. 636; Key v. Holloway, 7 Baxt. 575; Pierce v. Pierce, 38 Mich. 412; Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; Gardner, Wills, 129.

[48] See supra, § 63.

[49] Ravenscroft v. Stull, 280 Ill. 406, 117 N. E. 602, Ann. Cas. 1918B, 1130.

[50] Philadelphia Trust, Safe & Deposit Ins. Co. v. Allison, 108 Me. 326, 80 A. 833, 39 L. R. A. (N. S.) 39; Wadsworth v. Sharpsteen, 8 N. Y. 388, Seld. Notes 121, 59 Am. Dec. 499.

itself be sufficient to show incompetence to make a will, unless it is shown that it has resulted in depriving the testator of testamentary capacity at the time of making the will in question;[51] but its effect is generally recognized as being more permanent and lasting than that of intoxicating liquors,[52] and evidence of its habitual use raises a very strong question as to the testator's capacity to make a will.[53]

§ 467. Other forms of mental incompetency

Several forms of incompetency, which are not, strictly speaking, insanity as that term is commonly understood, are nevertheless recognized as affecting the competency of a testator, where they are present. One of such cases is where the testator attempted to make a will after he had entered into the death struggle, or in extremis, as it is termed. A will made under such circumstances is generally considered void, because a person in such condition has lost the power to concentrate his mind on worldly matters.[54] But it seems to be the rule that, when such will has been planned during strength, its subsequent execution in extremis will not avoid it, provided he understood at the time of the execution that he was completing the testamentary act he had before planned.[55]

§ 468. Spendthrift trusts

Another such form of incompetency is that of a spendthrift under guardianship, such person being considered irresponsible and not capable of making a will.[56] This is usually controlled by local statutes defining spendthrifts, and the extent of his dis-

51 Supra, § 457.

52 See supra, §§ 67, 58; 14 Am. St. Rep. 711, note.

53 Supra, § 67; 14 Am. St. Rep. 711, note.

54 In re Burrow's Estate, 11 Ohio Dec. 229, 8 Ohio N. P. 358.

55 Terry v. Davenport, 170 Ind. 74, 83 N. E. 636; Clifton v. Clifton, 47 N. J. Eq. 227, 21 A. 333; Hutchinson v. Hutchinson, 152 Ill. 347, 38 N. E. 926.

56 Beard, Wills, § 95; supra, §§ 99, 100.

abilities is defined by such statutes, as the disability is unknown to the common law.[57]

§ 469. Loss of senses of perception

Yet another form of incompetency is found to a limited extent in persons who have lost certain of their senses of perception. Persons in this condition are often classed as idiots, as we have seen supra,[58] and, owing to their helpless condition, statutes of the several states have in many instances thrown restrictions about their conveyances of property, including the making of wills.[59] As the idea of incompetency on the part of such persons is founded upon the idea that the absence of senses which will enable them to receive impressions from the outside world has likely prevented the development of their reasoning faculties and isolated them from contact with their fellows, the question of whether a person who is deaf, dumb, and blind has testamentary capacity depends upon the education and attainments of such testator, which will enable him to understand the facts necessary to give testamentary capacity, and will supply him with the means of communicating his wishes.[60] It is generally held that such facts must be shown by satisfactory evidence as a predicate for the admission of a will made by such person,[61] inasmuch as the common law presumed a person born deaf, dumb, and blind to be an idiot.[62]

[57] 36 Cyc. 803; 25 R. C. L. 349.

[58] Supra, § 28.

[59] Civ. Code Ga. 1910, § 3844; Stimpson's Am. Stat. Law (Jan. 1, 1886) § 2604; supra, § 28.

[60] 1 Wharton & Stillé's Med. Jur. § 96.

[61] Gerrish v. Nason, 22 Me. 438, 39 Am. Dec. 589; Harding v. Harding, 18 Pa. 340; Martin v. Mitchell, 28 Ga. 382; Wampler v. Wampler, 9 Md. 540; Gardner, Wills, p. 92; Chaplin, Wills, 30, 33.

[62] 1 Bl. Com. 304.

§ 470. Insanity as affecting power to revoke

Where a will has been made by a person mentally capable of executing it, it will ordinarily require the same amount of mental capacity to revoke it.[63] It may be said we think, that one must have testamentary capacity before he can revoke a will, as it requires practically the same mental process and capacity to revoke as it does to make a valid will. For example, it has been held that the same mental capacity is required for the execution of a codicil, whether it be regarded as a revocation of the original will or a new testamentary act.[64] Such a testator must be capable of entertaining an intent and an *intent* presupposes a capacity to intelligently foresee the purpose and result of such a revocation. There, too, is the additional reason that the weak mind is as open to imposition in the revocation of a will as it is in the making of one, and such revocation has been held to come within the statute of frauds as fully as the execution of the will itself and must be carried out with the same solemnities.[65] So it has been held that intoxication will have the same effect upon the revocation of a will as it will have upon the making of it in the first instance, and where a will is revoked by one under the influence of delirium tremens, the revocation will be without effect.[66]

§ 471. As affecting force of will

On the other hand, the fact that a person becomes hopelessly insane after making a will otherwise legal will not in any wise affect the force of such will or act as a revocation or annulment

[63] Rhodes v. Vinson, 9 Gill (Md.) 169, 52 Am. Dec. 685; Sewall v Robbins, 139 Mass. 164, 29 N. E. 650; Schaaf v. Peters, 111 Mo. App. 447, 90 S. W. 1037; Lang's Estate, 65 Cal. 19, 2 P. 491; Linkmeyer v. Brandt, 107 Iowa, 750, 77 N. W. 493; Apperson v. Cottrell, 3 Part. (Ala.) 51, 29 Am. Dec. 239; Beach, Wills, § 69; Decennial and Other Key No. Digests, Wills, ⟸169.

[64] Delafield v. Parish, 25 N. Y. 9.

[65] Garrett, Wills, pp. 252, 253; 40 Cyc. 1171.

[66] Brunt v. Brunt, 28 Law T. (N. S.) 368, 21 Wkly. Rep. 392.

of the same, however long the insanity may continue.[67] The testator's intentions for the disposition of his property having crystallized into a valid will, it will remain as such until revoked by the intelligent cancellation of the maker or until brought into effect by his death.

[67] Hughes v. Hughes' Ex'r, 2 Munf. (Va.) 209; Forse v. Hembling, 4 Coke, 60b; 76 Eng. Reprint, 1022; Warner v. Beach, 4 Gray (Mass.) 162.

PART 3

STATUS OF NON COMPOS BEFORE THE COURTS

CHAPTER 16

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§ 472. Status as a litigant, in general

The rules of law governing the status of a non compos person, when he appears in court as a litigant, grow out of two major considerations, viz.:

First, as the non compos is without mind sufficient to make an intelligent choice of action for his own best interests, or to resist unjust claims of others, it is obvious that the ordinary rules of procedure are inadequate to secure his rights as against an intelligent and active opponent.

Second, that as, notwithstanding the above, the non compos is a member of society, and as such is entitled to rights and subject to certain duties, and these rights and duties must be measured, protected, and restricted by the only means society has of protecting, measuring, and restricting the rights of its members, which is through the agency of its courts. It is, therefore, the policy of the law, while admitting the non compos to its courts as a litigant plaintiff or defendant, to nevertheless intrust his choice of action in that connection to a normal mind acting for him under the supervision and guidance of the court itself, and to lend him the mind of sovereignty as expressed in the judge of such court to resist any imposition from adverse interests.

§ 473. As plaintiff

An insane person may acquire and hold a chose in action as he may acquire and hold any other class of property,[1] and a necessary result of the right to acquire and hold choses in action, is the right to go into court and defend them, or reduce them to

[1] Supra, § 301.

possession.[2] While the contrary rule formerly existed at common law, it is now well settled that a non compos may become a plaintiff in court in a necessary action to protect his rights, and that this is necessarily an incident to the right of ownership itself.[3] Whether the action is to be brought in the name of the non compos himself, through the agency of his guardian, or in that of a volunteer acting as "next friend," depends very largely upon the local statutes of the respective states governing procedure. If there is a regularly appointed guardian, it is proper that the action be brought by the guardian.[4] If there is no regular guardianship, the action can be brought by the non compos, either in his own name or in that of another as next friend.[5] While, in the absence of statutory provision to the contrary, it would seem that the non compos may bring the action in his own name, yet it is the better practice to bring it in the name of a next friend; and, where it is brought in the name of the non compos in the first instance, it is usual for the trial court to appoint a guardian ad litem to conduct the further course of the litigation.[6] As a rule, the federal courts follow the law of the state where they are sitting, with respect to the form in which an action should be brought by a non compos, as this is in accordance with the Conformity Act.[7] Whatever the form, the action must be brought in behalf of the non compos, as he is the real party in interest. For example, a prospective heir cannot sue in his own right, as he has no actual rights in the estate so long as the non compos lives.[8]

2 Supra, §§ 302, 303, 304.
3 Supra, §§ 303, 304.
4 Supra, §§ 307, 309.
5 Supra, § 308 et seq.
6 Supra, § 311 et seq.
7 New York Evening Post Co. v. Chaloner, 265 F. 204; Dudgeon v. Watson, 23 F. 161.
8 Bradford v. Mackenzie, 89 Md. 763, 43 A. 923.

§ 474. As voluntary bankrupt

An insane person cannot, as a general rule, file a voluntary petition in bankruptcy, either in his own name or through a regularly appointed guardian. The reason for this exception to the general rule, allowing the non compos to file action in court, is that the filing of such a petition contemplates turning over to the bankrupt court, for the benefit of creditors, all of the bankrupt's property, to be administered for the benefit of such creditors, and the non compos is without mental power to register such an intent.[9]

§ 475. As defendant

At common law and in a majority of the American states, an insane person may ordinarily be sued in the manner and extent as a normal person, unless such procedure is expressly forbidden by statute.[10] Where the insane person is under guardianship, permission of the court must be secured in a few of the states before the action can be brought, under penalty of being held in contempt of court;[11] but this is not the general rule. In the absence of statute requiring it, the plaintiff in an action need not call the defendant's mental condition to the attention of the court;[12] but it is the better practice to do so and avoid the possibility of having the judgment set aside at a later date by appropriate proceedings, based on the defendant's incapacity at the time of the trial. In some states, statutes require that claims

[9] In re Eisenberg, 117 F. 786. Decennial and Other Key-Number Digests, Bankruptcy ⇐13.

[10] Patton v. Taylor, 144 Ark. 254, 222 S. W. 49; Davis v. Drew, 6 N. H. 399, 25 Am. Dec. 467; Jones v. Schaffner, 193 Iowa, 1262, 188 N. W. 787; Maloney v. Dewey, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131; Ex parte Northington, 37 Ala. 496, 79 Am. Dec. 67; Stigers v. Brent, 50 Md. 214, 33 Am. Rep. 317; 130 Am. St. Rep. 842.

[11] 14 R. C. L. 613; Decennial and Other Key-Number Digests, tit. Insane Persons, ⇐90.

[12] Maloney v. Dewey, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131; Townes, Tex. Pleading, p. 454.

against a non compos be first submitted to the guardian or the probate court, where a guardian has been appointed or an adjudication of insanity has been had.[13] In such case, the proper submission of such claim is a condition precedent to the right to sue, and where it is not a condition precedent to the right to sue it is the better practice to follow the statutory requirement.

§ 476. Death—Effect of

It seems to be the general rule that the death of a non compos defendant will operate as an abatement of a suit, even where he is represented by a guardian or committee, and all proceedings between the time of such defendant's death and the revival of the suit, by making additional parties or changing the form thereof, are void.[14] The proper proceeding in such case depends to a large extent upon local statutes. In the absence of statutory enactment, the proper practice is to amend by making the administrator or executor party and then proceed with the action.[15] The reason for this is that the non compos is the real defendant, and the guardian or committee is a mere formal party, figurehead, as it were, and upon the death of such non compos the action abates for the want of party defendant, since the office of guardian has passed away with the ward, and the action must be renewed against the estate and the proper custodian thereof; i. e., the administrator or executor.

13 Decennial and Other Key-Number Digests, tit. Insane Persons, ⊂⊃91; Rev. St. Tex. 1925, art. 4239 et seq.; Humphrey v. McCarty (Tex. Civ. App.) 251 S. W. 611.

14 Paxton v. Stuart, 80 Va. 873.

15 Findley v. Cowles, 93 Iowa, 389, 61 N. W. 998; Reando v. Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13.

§ 477. Appearance—How made

Upon the insanity of the defendant being brought to the attention of the trial court, whether by suggestion, pleading, or otherwise, it is usually held to be the duty of the court to take such action as will insure the protection of the interests of the non compos, either by directing that the guardian or committee be made party, or by the appointment of a guardian ad litem, to conduct the defense of the insane defendant.[16] By consent of the court, a volunteer may appear and defend for the non compos as next friend;[17] or where there is no regularly appointed guardian or committee,[18] or the interests of such guardian or committee are adverse to those of the non compos,[19] the court may appoint a guardian ad litem. Upon his appointment, it is usual for the guardian ad litem to conduct the defense of the suit under the direction of the court, who may direct such pleading, etc., as will conserve the best interests of the non compos defendant and at the same time secure a proper adjudication of the rights involved.[20] The extent and force of the discretion exercised by the next friend rests primarily upon his good faith, which he must show at all times. While he may enter into stipulations and consent to agreed judgments and decrees, such stipulation, judgments, and decrees are only binding upon the non compos de-

[16] Search v. Search, 26 N. J. Eq. 110; Ex parte Kibler, 53 S. C. 461, 31 S. E. 274; Justice v. Ott, 87 Cal. 530, 25 P. 691; Mansfield v. Mansfield, 13 Mass. 412; Plympton v. Hall, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675; 32 Cyc. 772, § 592.

[17] 32 C. J. 772.

[18] Bensieck v. Cook, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422; Plympton v. Hall, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675; Security Loan & Trust Co. v. Kauffman, 108 Cal. 214, 41 P. 467; Ex parte Roundtree, 51 S. C. 405, 29 S. E. 66.

[19] Isle v. Cranby, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513; Teal v. Woodworth, 3 Paige (N. Y.) 470.

[20] Austin v. Bean, 101 Ala. 133, 16 So. 41; Pyott v. Pyott, 90 Ill. App. 210.

fendant so far as they are found to be for his best interests,[21] and should at all times be made under the direction and approval of the court. While such next friend may incur costs, he is personally liable for such costs until he has shown the necessity therefor.[22] However, he should have the aid and support of the court in all acts done in good faith for the benefit of his client or ward. His duties should not necessarily terminate with the decision of the case in connection with which he is appointed in the trial court, but he may in proper cases appeal the case by proper proceedings to the appellate courts.[23]

§ 478. As defendant in divorce and bankruptcy

The rules relating to divorce proceedings, wherein the defendant is non compos, differ somewhat from those relating to other forms of action against the non compos. Such actions are now considered in the nature of civil rather than criminal proceedings, and suit may be brought in much the same manner as other civil actions, subject, however, to the defense of insanity in much the same way as criminal action.[24] This is a change from the old English rule, which seemed to regard such actions as criminal in their general nature, and frowned on the same because the non compos defendant was in a condition which precluded his making an adequate defense.[25] Such mental condition is now regarded as a misfortune only, and, while the action is allowed, every effort will be made to guard the interests of the non compos party, even to the extent of delaying the proceedings as long as there is any likelihood of the insane defendant

21 Campbell's Case, 2 Bland (Md.) 209, 20 Am. Dec. 360.

22 Nance v. Stockburger, 112 Ga. 90, 37 S. E. 125, 81 Am. St. Rep. 22, note.

23 Hunter v. Buchanan, 87 Neb. 277, 127 N. W. 166, 29 L. R. A. (N. S.) 147, Ann. Cas. 1912A, 1072.

24 Supra, §§ 418, 420.

25 Morduant v. Moncreiffe, 30 L. T. (N. S.) 649; 22 Weekly Rep. 12; Baker v. Baker, L. R. Prob. Div. 142, 49 L. J. Prob. (N. S.) 49, 42 L. T. (N. S.) 332; 28 Weekly Rep. 630.

recovering his reason, in order that he may be able to make his own defense.[26] In some states, notably Massachusetts and Rhode Island, statutes have been passed providing for the appointment of a guardian to conduct the litigation,[27] and, where no such statutes are in force, the nature of the case would call for the exercise of the equity powers of the court and the appointment of such a guardian. The matter has been treated from another angle in chapter 12.[28]

While, as a general proposition, the authorities seem to indicate that an involuntary petition in bankruptcy may be filed against a non compos,[29] yet it is well settled that an insane person cannot commit an act of bankruptcy, for the reason that he cannot entertain an intent to do so,[30] and a petition in bankruptcy against an insane person, based on his intent to "hinder, delay, and defraud" the creditors, will not be good, because of the insane person's not being able to entertain such an intent.[31] But where such person was sane at the time of commission of the act of bankruptcy, though he subsequently became insane, a petition in bankruptcy may be filed against him.[32]

§ 479. Pleadings by insane plaintiff

The form of pleading looking to the institution of suit on behalf of an insane plaintiff, in the absence of local codes or statutes controlling it, depends somewhat on whether the insane

[26] Stratford v. Stratford, 92 N. C. 297.

[27] Garnett v. Garnett, 114 Mass. 379, 19 Am. Rep. 369; Thayer v. Thayer, 9 R. I. 377.

[28] Supra, § 418 et seq.

[29] In re Weitzel, Fed. Cas. No. 17,365.

[30] In re Marvin, 1 Dill. 178, Fed. Cas. No. 9,178; In re Funk, 101 F. 244, 4 A. B. R. 96; In re Weitzel, 7 Biss. 289, Fed. Cas. No. 17,365.

[31] In re Funk, 101 F. 244, 4 A. B. R. 96; In re Ward, 161 F. 755, 20 A. B. R. 482.

[32] In re Pratt, 2 Lowell, 96, 19 Fed. Cas. No. 11,371; In re Kehler, 153 F. 235; Id., 159 F. 55; In re Burka, 107 F. 674, 5 A. B. R. 843.

plaintiff has been adjudged insane, and a guardian or committee appointed for him. If without guardian, etc., the proceeding may be brought in the name of some normal person acting as next friend for the incompetent plaintiff, so long as it is made to appear on the face of the pleadings that the non compos is the actual plaintiff in whose behalf the proceedings are brought.[33] As a matter of good practice, it should be clearly made to appear why it is necessary for the plaintiff to appear by next friend; e. g., that the plaintiff is mentally incompetent to bring the suit in his own behalf. Where the plaintiff has been declared insane and placed under guardianship, such fact should be alleged, and the guardian should appear as a formal party, or his absence from the pleading as a party to the action explained; e. g., that he has refused to act, that his interests are adverse to those of the insane party, etc.[34] Where there is some good reason why the guardian or committee cannot, or should not, join in the suit, the rule which requires his appearance therein is relaxed. For example, where the necessity for immediate action is imperative, and the regular guardian is absent from the state and cannot therefore act,[35] where the regular guardian is dead or refuses to act,[36] or where his interests are adverse to those of the insane ward,[37] the action may ordinarily be brought in the name of a next friend. Where the action is brought by the guardian, etc., it must ordinarily appear that it was brought on behalf of

[33] Lombard v. Morse, 155 Mass. 136, 29 N. E. 205, 14 L. R. A. 273; Burnet v. Bookstaver, 10 Hun (N. Y.) 481; Flynn v. Hancock, 35 Tex. Civ. App. 395, 80 S. W. 245; West v. West, 90 Ala. 458, 7 So. 830; Arnold v. Townsend, 14 Phila. (Pa.) 216; Bearss v. Montgomery, 46 Ind. 544.

[34] Dixon v. Cardozo, 106 Cal. 506, 39 P. 857; Jones v. Schaffner, 180 N. W. 672, superseded by 193 Iowa, 1262, 188 N. W. 787; Wirth v. Weigand, 85 Neb. 115, 122 N. W. 714, 35 L. R. A. (N. S.) 1103; Hardenbrook v. Sherwood, 72 Ind. 403.

[35] Supra, § 310.

[36] Supra, § 310.

[37] Supra, § 310.

the insane ward, who is the real party,[38] and the appointment and qualification of such guardian should also be set out.[39]

§ 480. Allegations of disaffirmance—Necessity for

Where the action is brought by or on behalf of the non compos, to avoid some act of the plaintiff on the ground of his incompetency, such incompetency must be alleged.[40] Whether the pleading should go further, and allege that such act has been subsequently disaffirmed by the incompetent, is a matter on which the courts seem to be divided. The majority of the cases seem to hold that, where the action is to avoid an executed contract, the pleading should allege a disaffirmance, for the reason that an executed contract is assumed to be ratified unless the contrary appears.[41] On the other hand, another line of decisions holds that the question of ratification is one of defense, and that it must be pleaded and proven by the defendant.[42] We think the two lines of decisions can be reconciled, in this: Where the allegations of the plaintiff's pleadings merely set out the mental capacity of the plaintiff at the time of the transaction, and do not clearly show the nature of the disability, and that it is permanent in its form and still continues, the presumption in favor of the validity of the executed transaction will control, and the pleadings will be insufficient, in the absence of an affirmative allegation of disaffirmance on the part of the non compos or his guardian, etc.; but, where the plaintiff's pleading shows that the insanity is permanent and continuing,

[38] Coke, Litt. p. 135b; Sidwell v. Kaster, 289 Mo. 174, 232 S. W. 1005; Bearss v. Montgomery, 46 Ind. 544; Redmond v. Peterson, 102 Cal. 595, 36 P. 923, 41 Am. St. Rep. 204.

[39] Dixon v. Cardozo, 106 Cal. 506, 39 P. 857; Palmer v. Sinnickson, 59 N. J. Eq. 530, 46 A. 517.

[40] Fulwider v. Ingels, 87 Ind. 414.

[41] Ashmead v. Reynolds, 127 Ind. 441, 26 N. E. 80; Ætna Life Ins. Co. v. Seller, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481.

[42] Alamo Dressed Beef Co. v. Yeargan, 58 Tex. Civ. App. 92, 123 S. W. 721.

and the incapacity still exists at the time of the bringing of the action, no allegation of disaffirmance is necessary, for the reason that disaffirmance by an insane person would be a vain act in itself, and could not have any controlling influence over the results of the transaction complained of. Where the non compos defendant in the action has become plaintiff in a cross action or complaint, in which his insanity is pleaded as in avoidance of the original action, the same rules will control as in the case where he is plaintiff.[43]

§ 481. Parties in actions against non compos

Where the suit is against an insane person, it is best to bring the action against the insane ward and join the guardian or committee as a formal party.[44] Except where otherwise allowed by force of statute,[45] the ward is a necessary party, and failure to join him in the pleading will subject it to demurrer or other appropriate legal objection.[46] But the tendency is to hold the omission of his name to be a mere technical matter, which may be waived[47] or supplied by subsequent amendment.[48] The guardian, etc., on the other hand, is looked upon as a mere formal party, and the absence of his name will not be very material, so long as the ward has the benefit of his representation.[49] In the absence of controlling statutes, it would seem that the manner and form of joining guardians, committees, guardians ad

[43] 32 C. J. 785, § 637.

[44] Wisdom v. Shanklin, 74 Mo. App. 428; Decennial and Other Key-Number Digests, tit. Insane Persons, ⊂⊃97.

[45] Clough v. Monro, 86 Wash. 507, 150 P. 1190.

[46] Gibson v. Shull, 251 Mo. 480, 158 S. W. 322; Green v. Kornegay, 49 N. C. 66, 67 Am. Dec. 261; Thronson v. Blough, 38 N. D. 574, 166 N. W. 132; Behlen v. Behlen, 73 App. Div. 143, 76 N. Y. S. 747; Dixon v. Cardozo, 106 Cal. 506, 39 P. 857.

[47] Gibson v. Shull, 251 Mo. 480, 158 S. W. 322; Berry v. Rogers, 2 B. Mon. (Ky.) 308; Randell v. Lonstorf, 126 Wis. 147, 105 N. W. 663, 3 L. R. A. (N. S.) 470, 5 Ann. Cas. 371.

[48] Berry v. Rogers, 2 B. Mon. (Ky.) 308.

[49] Burger v. Boardman, 254 Mo. 238, 162 S. W. 197.

litem, etc., rests largely within the sound discretion of the trial judge, who may allow the substitution or addition of the guardian, etc., or his intervention in the suit, or even substitute one guardian for another; e. g., regular guardian for a guardian ad litem, and vice versa.[50] In those jurisdictions where leave of the court is required before a suit can be filed against an insane person, it is usually required that the pleading allege that such leave has been had.[51]

§ 482. Insane defendant—Pleadings by

While the defensive pleading of a non compos defendant is ordinarily governed by the usual rules of pleading,[52] yet the strict requirements are relaxed, where necessary to protect his interests. Following the rule that the court will guard as far as possible the rights of an insane litigant in its bounds,[53] all formal defects of pleading will be excused, and they will be made to conform to the record by proper amendments where necessary.[54] The rule requiring verified denials in given cases will usually be suspended, so as to save the non compos from any disadvantage arising from not having made such verification,[55] since the insane litigant may not have the mind to make such oath, and the guardian, etc., may not have the knowledge to do so for him.

§ 483. Raising question of insanity

Just what an answer of an insane person must be, in order to interpose the fact of his insanity as a bar to a suit brought against him, is not well settled. While there is some authority for the

[50] 32 C. J. 780, § 618.

[51] Kent v. West, 33 App. Div. 112, 53 N. Y. S. 244.

[52] 32 C. J. 784, § 635.

[53] American Mortg. Co. v. Dewey, 106 App. Div. 389, 94 N. Y. S. 808; In re Manning's Estate, 85 Neb. 60, 122 N. W. 711.

[54] Manders' Committee v. Eastern State Hospital (Ky.) 84 S. W. 761.

[55] Collins v. Trotter, 81 Mo. 275.

proposition that insanity must be specially pleaded,[56] yet the decided tendency is to hold that the defense of insanity may be shown under any form of plea which amounts to a denial of the cause of action pleaded against such non compos,[57] as, for example, a plea of non est factum to a suit on a written instrument.[58] Indeed, it is held that an answer admitting the execution of the instrument in suit, but seeking to avoid it by setting up the fact that the maker was insane, is itself a plea of non est factum.[59] Not having sufficient mental capacity to know what he was doing, the act was not his own; and he may therefore set up that he did not execute the instrument in question. It is also held that the mental capacity of a defendant alleged to be insane may be shown under a general denial or the plea of the general issue.[60] The defense of insanity may be presented by a plea in the nature of confession and avoidance, or by a special plea[61] setting out the facts of insanity, in which case it should contain all the necessary averments, including a showing that the insanity was permanent and continuing, or that the action sued on had been disaffirmed.[62] The plea, also, should be something more than a mere legal conclusion, and should state facts sufficient to show unsoundness of mind.[63] But, as in case of pleading initiating a suit, the defensive pleading will be construed and limited, so that the interests of the non compos may not be injured by his indiscretion; and where damaging admissions are made in the answer, even where made by a guardian or other authorized representative, they will not be allowed to bind the non

56 Harrison v. Richardson, 1 M. & Rob. 504.

57 Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Crawford v. Scovell, 94 Pa. 48, 39 Am. Rep. 766; Walker v. Clay, 21 Ala. 797; Allen v. Babcock, 1 Har. (Del.) 348.

58 Collins v. Trotter, 81 Mo. 275; Bensell v. Chancellor, 5 Whart. (Pa.) 371, 34 Am. Dec. 561.

59 Milligan v. Pollard, 112 Ala. 465, 20 So. 620.

60 Burke v. Allen, 29 N. H. 106, 61 Am. Dec. 642.

61 Nichols & Shepard Co. v. Hardman, 62 Mo. App. 153.

62 See supra, § 480.

63 Batman v. Snoddy, 132 Ind. 480, 32 N. E. 327.

compos defendant to his prejudice, and may be corrected under the direction of the court, upon the matter being brought to its attention.[64] While the authorities are somewhat divided on the question, we suggest that the better practice is to raise the defense of insanity, and its effect in avoiding the matter defended against, by specific plea setting out the facts, as such practice would amply protect the interests of the non compos, and would at the same time apprise the opposite party of the facts relied on in defense of his action, so that he could prepare to meet it.

§ 484. As affected by subsequent insanity

Where the non compos defendant has become insane since the filing of his defensive pleadings, a somewhat different condition arises. As he had his full mind at the time of deciding upon and stating his defense, there would be no reason for affording him any peculiar protection in that respect, and it is therefore held that such insanity will ordinarily not affect pleadings filed prior to the insanity,[65] and that these pleadings may be adopted by the guardian or committee subsequently appointed.[66]

§ 485. Collateral pleas

Matters which are a defense in themselves, although aggravated by, or dependent upon, the insanity of the plaintiff, must ordinarily be pleaded independent of the plea of insanity. This is to give the adverse party proper notice of the cause of action, or grounds of defense. For example, undue influence cannot ordinarily be proven under a plea of insanity, even when the undue influence was made possible by the mental weakness or incompetency of the person influenced. Such an action is really sounding in fraud, and the indicia of fraud must be pleaded.[67] But where the facts as set out in the pleadings, pur-

[64] Collins v. Trotter, 81 Mo. 275; Calloway's Committee v. Dinsmore, 83 Va. 309, 2 S. E. 517.

[65] Harton v. Little, 166 Ala. 340, 51 So. 974.

[66] Harton v. Little, 166 Ala. 340, 51 So. 974.

[67] Darnell v. Rowland, 30 Ind. 342.

porting to set out the transaction complained of, themselves show the fraud, or the fraud can reasonably be inferred from them, it will be sufficient, though undue influence is not specifically charged.[68]

§ 486. Answer to suit of non compos

The answer of a defendant to a suit filed by an insane plaintiff is ordinarily controlled by the usual rules of pleading, except where the answer involves the capacity of such plaintiff. Where the reply questions the plaintiff's capacity to bring the action because of his mental condition, such pleading is considered as a plea in abatement, calling for compliance with the requirements of such pleas, and failure to meet the requirements of a plea in abatement as to form and time of presentment will be taken as a waiver of the plea.[69] The ordinary practice is to raise the question by a plea or motion to abate the suit, or strike the pleading as having been filed without authority.[70] Where the non compos plaintiff is under guardianship, this might be proper, since the guardian is the one ordinarily expected to act; but, where he is not under guardianship, the propriety of such a plea is doubtful. It has been held by good authority that such a plea, where the plaintiff has not been judicially declared insane, is frivolous, and should be stricken,[71] and that an application might properly be made in such case for a stay of proceeding, looking to the appointment of a proper guardian or next friend.[72] Where the question raised by the answer is the lack of authority

[68] Brice v. Brice, 5 Barb. (N. Y.) 533; Yount v. Yount, 144 Ind. 133, 43 N. E. 136; Ashmead v. Reynolds, 134 Ind. 136, 33 N. E. 763, 39 Am. St. Rep. 238; Hick v. Thomas, 90 Cal. 289, 27 P. 208, 376; Probasco v. Probasco, 30 N. J. Eq. 63; Hounshell v. Sams, 9 S. W. 410, 10 Ky. Law Rep. 485.

[69] Jetton v. Smead, 29 Ark. 372; Allen v. Pannell, 51 Tex. 165; Lang v. Whidden, 2 N. H. 435; Buck v. Ehrgood, 4 Pa. Co. Ct. R. 312.

[70] Dudgeon v. Watson, 23 F. 161.

[71] Williams v. Empire Woolen Co., 7 App. Div. 345, 39 N. Y. S. 941.

[72] Dudgeon v. Watson, 23 F. 161.

in the next friend to file the suit, much the same rules apply with reference to the nature of the plea; i. e., it is a plea in abatement, which must be considered as a preliminary matter [73] or is waived. While it is generally raised by a special plea in the nature of a plea in abatement, yet in some jurisdictions it may be raised by demurrer.[74] In those jurisdictions where leave to sue on behalf of the non compos is required, the question may be raised by a motion to strike,[75] or by demurrer, where there are several plaintiffs, and a motion to strike would not reach all of them.[76] The want of authority on the part of a guardian to file a suit should ordinarily be raised by a plea specifically charging such lack of authority,[77] or by a plea in abatement; [78] and, if not so raised, the question of want of authority on the part of the guardian to bring the suit is considered waived.[79] In the same way, irregularities in bringing a suit in the name of a guardian, rather than in the name of the non compos by such guardian, may be raised by demurrer, since they appear of record,[80] or by a plea in abatement, which is waived if made after a plea in bar.[81]

[73] Stanley v. Stanley, 123 Ga. 122, 51 S. E. 287; Houseman v. Home Ins. Co., 78 W. Va. 203, 88 S. E. 1048, L. R. A. 1917A, 299; Worthington v. Mencer, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407.

[74] La Grange Mills v. Kener, 121 Ga. 429, 49 S. E. 300; Houseman v. Globe & Rutgers Fire Ins. Co., 78 W. Va. 586, 89 S. E. 269.

[75] Collins v. Toppin, 63 N. J. Eq. 381, 51 A. 233.

[76] Palmer v. Sinnickson, 59 N. J. Eq. 530, 46 A. 517.

[77] Kaack v. Stanton, 51 Tex. Civ. App. 495, 112 S. W. 702; Gates v. Carpenter, 43 Iowa, 152.

[78] Jones v. Schaffner, 180 N. W. 672, superseded by 193 Iowa, 1262, 188 N. W. 787; Buck v. Ehrgood, 4 Pa. Co. Ct. R. 312.

[79] Weimer v. Biesecker, 262 Pa. 460, 105 A. 829; Vance v. Ellerbe, 150 La. 388, 90 So. 735.

[80] Gibson v. Shull, 251 Mo. 480, 158 S. W. 322.

[81] Randall v. Lonstorf, 126 Wis. 147, 105 N. W. 663, 3 L. R. A. (N. S.) 470, 5 Ann. Cas. 371.

§ 487. Pleading in criminal cases

In criminal actions, the rule of pleading is even more liberal than in civil cases. Since the accused may be at a great disadvantage in making a proper defense, because of the natural helplessness arising from his weak mental condition, the law does not require the exactitude and formality required in presenting other pleas, where the accused is better able to look after his own interests. As a result, a wide degree of discretion, and consequent responsibility, is placed in the breast of the trial judge, to the end that an unfortunate non compos defendant may receive recognition of his condition and proper protection at the hands of the judge, sitting as a representative of national justice, in safeguarding the lives and liberty of those coming before him. Therefore it is the general rule that no formal plea of insanity is necessary, and that the issue may be raised by oral suggestion made by counsel or otherwise, by the affidavit of some reputable person, or by the court of his own motion,[82] unless a more formal plea is required by statutes or codes in force in the forum.[83] Some of the courts go still farther, and hold, in the absence of such statutory requirement, that the defense of insanity may be raised under the plea of "not guilty," since the plea of insanity is in itself a plea of not guilty,[84] or at least is a

[82] Guangando v. State, 41 Tex. 626; State v. Reed, 41 La. Ann. 581, 7 So. 132; Reg. v. Southey, 4 F. & F. 864; Frith's Case, 22 How. St. Tr. 307; Youtsey v. U. S., 97 F. 937, 38 C. C. A. 562; Rex v. Dyson, 7 C. & P. 305, 32 E. C. L. 637; Lermo v. State (Tex. Cr. App.) 68 S. W. 684.

[83] Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480; Ward v. State, 96 Ala. 100, 11 So. 217; Walker v. State, 136 Ind. 663, 36 N. E. 356.

[84] People v. McElvaine, 125 N. Y. 596, 26 N. E. 929; State v. Potts, 100 N. C. 457, 6 S. E. 657; Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480; State v. Reed, 41 La. Ann. 581, 7 So. 132; State v. Potts, 100 N. C. 457, 6 S. E. 657; People v. Olwell, 28 Cal. 456; Youtsey v. U. S., 97 F. 937, 38 C. C. A. 562; French v. State, 85 Wis. 400, 55 N. W. 586, 21 L. R. A. 402, 39 Am. St. Rep. 855.

part of it.[85] Since insanity is generally held to absolve one from guilt for crime committed under its promptings, so as to entirely excuse the act, we see no reason why it should not be provable under a general plea of not guilty, especially if the state had notice that such a defense would likely be offered, and suffered no surprise. The propriety of such a rule is emphasized by the rule, recognized in many jurisdictions, to the effect that the defense of insanity at the time of the commission of the offense charged can be urged at any time during the course of the trial, regardless of whether it has been specially pleaded;[86] the idea seeming to be that the plea of not guilty, which is always interposed, would be sufficient in itself. But we think the most logical rule would be to hold a special plea to be superfluous.[87]

§ 488. Subsequent to offense

It frequently happens that a non compos defendant becomes insane after the offense charged. As we have noticed supra,[88] it is not the policy of the law to punish such a person so long as such condition exists. It is therefore generally held that the mental condition may be brought to the attention of the court, or be taken cognizance of by it of its own motion, at the time of the arraignment or any subsequent period of the trial,[89] with much the same effect as where the insanity existed at the time of the crime, and, if sustained, it will operate to suspend further proceeding.

[85] Long v. State, 38 Ga. 491.

[86] Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480; People v. Olwell, 28 Cal. 456; State v. Potts, 100 N. C. 457, 6 S. E. 657; State v. Reed, 41 La. Ann. 581, 7 So. 132.

[87] State v. Potts, 100 N. C. 457, 6 N. E. 657; Danforth v. State, 75 Ga. 614, 58 Am. Rep. 480.

[88] See supra, § 452.

[89] People v. Ah Ying, 42 Cal. 18; State v. Reed, 41 La. Ann. 581, 7 So. 132.

§ 489. Pleading after conviction

After a verdict of guilty and a sentence has been imposed upon the defendant, his present insanity may nevertheless be imposed to stay the carrying out of the sentence; but it will be received with much more restrictions than imposed before conviction. Indeed, it is said that the plea of insanity at this stage is nothing more than an appeal to the mercy and humanity of the court to postpone execution of the sentence during the helpless and pitiful condition of the prisoner as a matter of dispensation.[90] It is in no sense a matter of right, unless made so by statute, since the verdict was conclusive of the defendant's sanity at the time of the conviction.[91] For this reason, the discretion of the court is very large, and, except where restricted by statute, it may review the defendant's sanity on its own motion, or on oral suggestion, without a formal plea being filed.[92] However, since the refusal to allow such an inquiry is appealable in some jurisdictions, it is the better practice to present such a matter to the court in the form of a suggestion of the convicted person's insanity, and an application for an inquiry either before the court itself, or before a commission according to the provisions of local statutes, accompanied by proper affidavits or other evidence tending to support the plea; otherwise, the trial court might be justified in disregarding the mere suggestion made in face of the verdict, and the appellate court would have nothing before it tending to show there was any ground for the application.[93] There is the further reason that the institution of an

[90] Laros v. Com., 84 Pa. 200, 210; Nobles v. Georgia, 168 U. S. 398, 18 S. Ct. 87, 42 L. Ed. 515; Carr v. State, 98 Ga. 89, 27 S. E. 148; Williams v. State, 45 Fla. 128, 34 So. 279.

[91] State ex rel. Paine v. Potts, 49 La. 1500, 22 So. 738; In re Smith, 25 N. M. 48, 176 P. 819, 3 A. L. R. 83.

[92] Gonzales v. United States, 40 App. D. C. 450; Hover's Petition, 19 Pa. Dist. R. 512; State ex rel. Chandler, 45 La. 696, 12 So. 884; State v. Helm, 69 Ark. 167, 61 S. W. 915.

[93] Williams v. State, 45 Fla. 128, 34 So. 279; Duncan v. State, 110 Ark. 523, 162 S. W. 573; Com. v. Schmous, 162 Pa. 326, 29 A. 644.

inquiry into the sanity of such person would be an exercise of original jurisdiction, and could not be exercised by an appellate court.[94] The matter may also be taken advantage of by a motion in arrest of judgment, in which case a similar showing should be made by affidavits, etc., sufficient to satisfy the court that there was probable ground for the motion. It is also held that the matter may be taken advantage of by a motion for new trial.[95] Where the court is satisfied, from his own inspection of the convict, that there is probable ground, it would seem that the formal motion, with its attendant proof, may be dispensed with, and the court can act of its own motion.[96] Also it may seem that the matter may be brought before the court by an application or petition presented in the name of a normal person as next friend for the convict or convicted person.[97] While it is held that a jury, to pass on the question of the sanity of a person, raised after conviction or sentence, is not a matter of right, and that failure to allow a jury trial will not be objectionable, as depriving one of life or liberty without due process of law,[98] yet the court may, and frequently does, call in a jury to assist him in passing on the question of the convicted person's sanity;[99] and, if a jury hearing is thought desirable, the application for hearing on the prisoner's sanity should also contain a request for a jury, accompanied, if possible, by a showing why a jury would be desirable.

[94] O'Neal v. State, 111 Ark. 42, 163 S. W. 794.

[95] Taffe v. State, 23 Ark. 34; Humphreys v. State (Tex. Cr. App.) 39 S. W. 679.

[96] In re Smith, 25 N. M. 56, 176 P. 819, 3 A. L. R. 88.

[97] See section 453.

[98] Nobles v. Georgia, 168 U. S. 398, 18 S. Ct. 87, 42 L. Ed. 515.

[99] State ex rel. Chandler, 45 La. 696, 12 So. 884; Williams v. State, 45 Fla. 128, 34 So. 279; Baughn v. State, 100 Ga. 554, 28 S. E. 68, 38 L. R. A. 577.

§ 490. Statutory rule

In a number of the states the right to inquiry into a person's sanity after he has been convicted of crime is expressly given by statute;[1] and in such jurisdictions the pleading and practice incident to bringing the matter to the court's attention is usually prescribed by the local statute. The courts have been inclined to give a somewhat liberal construction to such statutes, and it is held that the fact that the plea of insanity was interposed at the trial and decided adversely to defendant will not prevent its being raised under the statute at the time of sentence.[2] However, the pleading under which the insanity is sought to be called to the court's attention should show that the insanity has occurred subsequent to the trial, especially where it was pleaded at the trial and passed on adversely to defendant,[3] and should, if possible, be accompanied by affidavits, certificates of examining physicians, etc., tending to make a showing of present insanity, although this is not strictly required.[4] But, even under statutes, the application is usually addressed to the sound discretion of the court; and it becomes the duty of the court to make the inquiry under the statutory regulations, where reasonable grounds appear for believing the prisoner insane,[5] especially when it has already been submitted at the trial and found adversely to the defendant, and the finding affirmed on appeal.[6]

[1] Johnson v. State, 97 Ark. 131, 133 S. W. 596; State v. Cooper, 169 Iowa, 571, 151 N. W. 835; People v. Knott, 122 Cal. 410, 55 P. 154; Springer v. State, 63 Tex. Cr. R. 266, 140 S. W. 99; Stover v. Com., 92 Va. 780, 22 S. E. 874.

[2] Ince v. State, 76 Ark. 615, 88 S. W. 818.

[3] Springer v. State, 63 Tex. Cr. R. 266, 140 S. W. 99; Stover v. Com., 92 Va. 780, 22 S. E. 874.

[4] State v. Helm, 69 Ark. 167, 61 S. W. 915.

[5] Ince v. State, 76 Ark. 615, 88 S. W. 818; People v. Knott, 122 Cal. 410, 55 P. 154; Springer v. State, 63 Tex. Cr. R. 266, 140 S. W. 99; Gonzales v. United States, 40 App. D. C. 450; State v. Cooper, 169 Iowa, 571, 151 N. W. 835.

[6] Hodges v. State, 111 Ark. 22, 163 S. W. 506.

§ 491. Service of process on non compos, in general

Where the non compos defendant has not been judicially declared insane and placed under guardianship, service of process should be had on him in the same manner as a normal person.[7] This is ordinarily necessary to confer jurisdiction and support a judgment against such defendant;[8] and, in the absence of statutes to the contrary, service upon him alone is sufficient.[9] In some of the states, statutes require additional service upon designated persons, who are supposed to act for the non compos defendant;[10] and in such case the requirements of the statutes should be followed, in order to secure jurisdiction.

§ 492. Service after appointment of guardian

Where a defendant has been adjudged insane and a guardian appointed for him, service of process should be made upon the guardian,[11] and it is not ordinarily necessary, though proper, that the insane ward be personally served.[12] Since the guardian is the one who will determine upon and direct the defense, and

[7] Norman v. Central Kentucky Asylum for Insane (Ky.) 79 S. W. 189; Id., 80 S. W. 781, 26 Ky. Law Rep. 71; Sacramento Sav. Bank v. Spencer, 53 Cal. 737; Gerster v. Hilbert, 38 Wis. 609; Taylor v. Lovering, 171 Mass. 303, 50 N. E. 612; State ex rel. Happel v. District Court of the Ninth Judicial Dist. in and for Gallatin County, 38 Mont. 166, 99 P. 291, 35 L. R. A. (N. S.) 1098, 129 Am. St. Rep. 636.

[8] Eversole v. Eastern Kentucky Asylum for Insane, 100 S. W. 300, 30 Ky. Law Rep. 989; Gerster v. Hilbert, 38 Wis. 609.

[9] Bobell v. Wagenaar, 106 Or. 232, 210 P. 711.

[10] Brink v. Wolf, 24 Pa. Co. Ct. R. 197; Bayne v. Stratton, 131 Ky. 494, 115 S. W. 728.

[11] Burger v. Boardman, 254 Mo. 238, 162 S. W. 197; Rutherford's Lessee v. Folger, 20 N. J. Law, 115; Marquis v. Wiren, 74 Kan. 775, 87 P. 1135; Hulings v. Laird, 21 Pa. 265; Lieblin v. Breyman Leather Co., 82 Or. 22, 160 P. 1167.

[12] Shoemake v. Smith, 80 Iowa, 655, 45 N. W. 744; Ingersoll v. Harrison, 48 Mich. 234, 12 N. W. 179; Redmond v. Peterson, 102 Cal. 595, 36 P. 923, 41 Am. St. Rep. 204; Jones v. Crowell, 143 Ind. 218, 42 N. E. 612.

the ward is supposedly without mind to exercise any intelligent discretion in the matter, it is only required from a practical standpoint that the former have notice. Even where the guardian is appointed subsequent to the institution of the suit, it is the better practice to make him a party and serve him with process.[13] In some of the states actions against the estate of the insane ward are allowed by statute to be brought against the guardian or committee, without naming the ward, and in such case service upon the guardian or committee is sufficient.[14] Where, however, there is any doubt about the local practice, it is the better practice to serve both the non compos defendant and his guardian, as the question is somewhat unsettled in some of the states.[15] Service upon a foreign guardian is not ordinarily sufficient, as the guardian's powers as such do not extend beyond the state of his appointment,[16] and, unless the ward is within the reach of service, citation ordinarily resorted to against a nonresident defendant should be secured.[17] Where the non compos defendant is beyond the state, or cannot be reached with personal service, because of confinement in an asylum or ill health, substitute service on the resident guardian, wife, superintendent of the asylum, etc., has been recognized;[18] but, unless such service is permitted by local statutes, we doubt its force as supporting a judgment against the non compos.

[13] Barry v. Fain's Adm'r, 172 Ky. 309, 189 S. W. 220.

[14] Clough v. Monro, 86 Wash. 507, 150 P. 1190.

[15] Scott v. Winningham, 79 Ga. 492, 4 S. E. 390; Ingersoll v. Harrison, 48 Mich. 234, 12 N. W. 179; Taylor v. Lovering, 171 Mass. 303, 50 N. E. 612; Potts v. Hines, 57 Miss. 735.

[16] Rogers v. McLean, 34 N. Y. 536, 31 How. Prac. 279.

[17] Moran v. Coffin, 194 Ky. 843, 241 S. W. 338; Carter v. Burrall, 80 App. Div. 395, 81 N. Y. S. 30; Sturges v. Longworth, 1 Ohio St. 544; Matter of Cortwright, 3 Dem. Sur. (N. Y.) 13.

[18] Hundley v. Sumrall, 144 Ky. 73, 137 S. W. 842; Limbert v. Hayward, 13 M. & W. 481, 153 Eng. Reprint, 200; State Bank of Williams v. Gish, 167 Iowa, 526, 149 N. W. 600; Jones v. Clyman, 193 Iowa, 1248, 188 N. W. 954; Gardner v. Howard, 197 Ky. 615, 247 S. W. 933.

§ 493. Waiver of service on non compos

As a general rule, an insane person cannot waive service and enter his appearance in court,[19] and it cannot ordinarily be done for him by an attorney, unless such attorney represents the legal guardian, or has been appointed guardian ad litem himself.[20] Such appearance or waiver should be made by the regular guardian, or by the guardian ad litem under direction of the court.[21] But, if objectionable, the courts have been inclined to hold that acceptance of service by a guardian ad litem, even where it is not strictly regular, will be looked upon as a mere irregularity, and not as vitiating the judgment, in the absence of a showing that the ward was prejudiced thereby.[22] Likewise it has been held that the appearance of the regular guardian in the name of the ward will cure lack of service on the insane ward.[23]

§ 494. Preliminary to appointment of guardian ad litem

Personal service on an alleged insane person is necessary before a guardian ad litem can be appointed,[24] or before he can be adjudged insane under a lunacy proceeding,[25] and any form

[19] Supreme Lodge of A. O. U. W. v. Zuhlke, 129 Ill. 298, 21 N. E. 789; Stoner v. Riggs, 128 Mich. 129, 87 N. W. 109; State v. District Court of Second Judicial Dist., 30 Mont. 8, 75 P. 516.

[20] State v. District Court of Second Judicial Dist., 30 Mont. 8, 75 P. 516; Rutherford's Lessee v. Folger, 20 N. J. Law, 115.

[21] Stoner v. Riggs, 128 Mich. 129, 87 N. W. 109; Hill v. Guaranty Trust Co., 157 App. Div. 907, 142 N. Y. S. 346; McCrady v. Sebastian, 150 La. 459, 90 So. 760; Stuard v. Porter, 79 Ohio St. 1, 85 N. E. 1062.

[22] Groves v. Ware, 182 N. C. 553, 109 S. E. 568.

[23] Taylor v. Lovering, 171 Mass. 303, 50 N. E. 612; State Bank of Williams v. Gish, 167 Iowa, 526, 149 N. W. 600.

[24] Smith v. Keteltas, 27 App. Div. 279, 50 N. Y. S. 471; In re Hunter's Estate, 84 Iowa, 388, 51 N. W. 20; Newcomb's Ex'rs v. Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222; Taylor v. Lovering, 171 Mass. 303, 50 N. E. 612.

[25] White v. White, 108 Tex. 571, 196 S. W. 508, L. R. A. 1918A, 349; White v. White, 108 Tex. 571, 196 S. W. 515, L. R. A. 1918A, 349.

of proceeding which does not make provision for such notice is void, as being without due process of law. The form of notice is usually prescribed by local statutes governing lunacy proceedings and guardianships for alleged non compos persons, and provides for personal service and opportunity to such person to be heard and to present his defense through an attorney of his own selection.

§ 495. Form of hearing

Because of the importance of the question, which involves the liberty of the person involved, the question of a person's sanity, or lack of it, can only be heard in the first instance before a regular judicial tribunal. Until the question is a part of a judicial inquiry, a court or any accessory to it may not go into the question of a person's sanity. Thus it is held that a court has no authority to inquire into the sanity of a person who is under indictment before it, but who is at large under bail.[26] The court's authority to make such an inquiry would only attach when the defendant is placed on trial before it with reference to the crime with which he is charged. Similarly, it has been held that a grand jury may not consider the question of a person's sanity in passing on the advisability of finding an indictment against him, the question of his insanity as a defense being for the trial court to pass on.[27]

§ 496. Requirements, in general

The trial, whether in connection with a criminal hearing, or mere inquiry into the person's sanity preliminary to the criminal hearing, or incident to the appointment of a guardian on commitment to an aslyum, must be held under the usual constitutional guaranty; i. e., must be by due course of law. As a rule, he is entitled to counsel of his own choosing, and reasonable oppor-

26 Ex parte Trice, 53 Ala. 546.
27 Reg. v. Hodges, 8 C. & P. 195, 34 E. C. L. 686.

tunity to secure witnesses and prepare his own defense.[28] He has a right to trial before a regularly constituted jury,[29] and trials before commissions of physicians and alienists appointed by the court, or some governmental agency, are generally held to be unconstitutional, as not being a trial by due process of law,[30] unless the Constitution and statutes of the state provide otherwise. In this latter case commitments under findings of various commissions and boards provided for by the law and usages of such states have been held not to have been without due process of law.[31] This is not the case, however, where the question of a defendant's sanity is raised after he has been convicted in a criminal case, since he has already had his trial by jury; and his further hearing on the question of insanity is a matter discretionary with the judge of such court, who may submit it to a jury if he thinks proper.[32]

§ 497. Forms of inquiry

Where the question of a defendant's insanity has been raised in a criminal case, two courses of procedure are usually open to the trial judge, viz.:

(1) He may submit the question of the defendant's sanity to the jury trying the criminal case, as one of the issues to be determined by them in arriving at the defendant's guilt or innocence. This is done under appropriate instruction, and, where

[28] Warrick v. Moore County (Tex. Civ. App.) 291 S. W. 956; Simon v. Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1170.

[29] Buswell, Insanity, p. 35; 2 Maccock's Chancery, 728; Howard v. Howard, 87 Ky. 616, 9 S. W. 411, 1 L. R. A. 610. See supra, § 128.

[30] White v. White, 108 Tex. 571, 196 S. W. 508, L. R. A. 1918A, 349; Shumway v. Shumway, 2 Vt. 339. See supra, §§ 128, 495; Greenwood v. Furr (Tex. Civ. App.) 251 S. W. 336.

[31] Montana Co. v. St. Louis Min. & Mill. Co., 152 U. S. 171, 14 S. Ct. 506, 38 L. Ed. 398; Simon v. Craft, 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1165; In re Crosswell's Petition, 28 R. I. 137, 66 A. 55, 13 Ann. Cas. 877; Chaloner v. Sherman, 242 U. S. 456, 37 S. Ct. 136, 61 L. Ed. 434.

[32] See supra, § 154.

there is a question of such defendant's present recovery, it is usual for the jury to make a special finding on the defendant's present sanity, so that he can be properly restrained or committed to an asylum, if it is found that he was insane when the criminal act was committed, and has not recovered his sanity, or that he has become insane since the commission of such crime.[33]

(2) He may direct a separate inquiry, either on his own motion, where the insanity is obvious and unmistakable, or upon application by or on behalf of the defendant. In such case, the proceedings usually take the form of a lunacy proceeding under the statutes of the forum, and the question of the defendant's sanity is submitted to a special commission or jury impaneled for that purpose.[34] In this connection, it is held that, where a jury has been used in the trial of the special issue of insanity, the same should not be used again in the trial of the main case, even where it could not agree to a verdict on the first hearing. Having heard the first issue, the jury would not be an impartial jury for the trial of the main case.[35]

In some of the states, a separate trial before a commission or jury on the question of sanity is provided for.[36] But, where the question is not controlled by statute, the first procedure—that is, the submission of the question of sanity along with the other issues in the case to the regular jury—is the one usually em-

[33] State v. Charles, 124 La. 744, 50 So. 699, 18 Ann. Cas. 934; In re McWilliams, 254 Mo. 512, 164 S. W. 221; Com. v. Endrukat, 231 Pa. 529, 80 A. 1049, 35 L. R. A. (N. S.) 470; Lermo v. State (Tex. Cr. App.) 68 S. W. 684; Territory v. Kennedy, 15 N. M. 556, 110 P. 854; State v. Khoury, 149 N. C. 454, 62 S. E. 638; Youtsey v. U. S., 97 F. 937, 38 C. C. A. 562.

[34] State v. Charles, 125 La. 744, 50 So. 699, 18 Ann. Cas. 934; In re McWilliams, 254 Mo. 512, 164 S. W. 221; Granberry v. State, 184 Ala. 5, 63 So. 975; Walker v. State, 46 Neb. 25, 64 N. W. 357; State v. Savage, 79 N. J. Law, 583, 76 A. 1079.

[35] French v. State, 85 Wis. 400, 55 N. W. 566, 21 L. R. A. 402, 39 Am. St. Rep. 855.

[36] Firby v. State, 3 Baxt. (Tenn.) 358; People v. McElvaine, 125 N. Y. 596, 26 N. E. 929.

ployed.[37] This is especially true where the sanity is alleged to have existed at the time of the offense and is pleaded as a defense. Where the defendant is found to be insane on a separate preliminary inquiry, it operates as a stay of proceedings until he has recovered his mind,[38] or as a bar to further prosecution for the crime in question, where the finding is that the insanity existed at the time of the criminal act; and in the former case, the finding of present insanity will work a severance, where he is jointly indicted with other defendants.[39] Unless controlled by statute, the question of whether the issue of insanity is submitted in a preliminary hearing, or as an issue in the case itself upon the trial thereof, is discretionary with the trial judge.[40]

§ 498. As ground for postponement of continuance, in general

As we have seen supra,[41] it is not the policy of the law to allow a case to go to trial, where one of the litigants is insane and is not properly represented by some normal person, for the reason that such person is not capable of protecting his rights in the litigation.[42]

§ 499. In criminal cases

This is especially true in a criminal case, where the life or liberty of the insane person may be involved, and where it is brought to the attention of the court, either from his own observation, or by the suggestion of counsel or other person, it is within the discretion of the court to halt the trial until the fact

[37] See note 33, supra.

[38] See supra, § 455; People v. Farrell, 31 Cal. 576; Com. v. Hathaway, 13 Mass. 299.

[39] Marler v. State, 67 Ala. 55, 42 Am. Rep. 95.

[40] Lermo v. State (Tex. Cr. App.) 68 S. W. 684; State v. Kelly, 74 Vt. 278, 52 A. 434.

[41] See supra, §§ 473, 475.

[42] See supra, §§ 473, 475.

of the defendant's sanity can be determined.[43] If the suggestion of insanity is made by the means of an application for continuance, and is found to be well founded, the trial should be continued until the defendant has regained his mind.[44] But, of course, the insanity must be such as to impair his memory and render him incapable of conducting a rational defense; and mere mental disturbances, excitement of brain from intoxication, or derangement on other subjects, not affecting his ability to make a defense, will not be grounds for continuance.[45] When there is a well-founded doubt of the good faith of the defendant's allegations or suggestion of insanity, or there are other grounds for reasonable doubt of the existence of such insanity, the propriety of granting the continuance is left very largely to the discretion of the trial judge, and his action in the matter will not be reviewed by the higher court, in the absence of a showing that he has abused such discretion.[46] In aid of the exercise of such discretion in passing upon such an application for continuance, the trial judge may take any reasonable means of ascertaining the facts relating thereto, and of informing himself with reference to the same. Where the insanity is apparent, he may do this by a physical inspection or examination of the alleged insane person;[47] he may appoint a committee or a board of physicians to examine the accused, and act upon their report;[48] and, if there is reasonable ground to believe the accused insane,

[43] See supra, §§ 487, 488; Nix v. State, 20 Okl. Cr. 373, 202 P. 1042, 26 A. L. R. 1053.

[44] Gruber v. State, 3 W. Va. 699; People v. Farrell, 31 Cal. 576.

[45] Freeman v. People, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; In re Buchanan, 129 Cal. 330, 61 P. 1120, 50 L. R. A. 378; Lipscomb v. State, 76 Miss. 223, 25 So. 158.

[46] State v. George, 37 La. Ann. 786; Lipscomb v. State, 76 Miss. 223, 25 So. 158.

[47] Hardwick v. Com., 7 Ky. Law Rep. 363.

[48] Lipscomb v. State, 76 Miss. 223, 25 So. 158; State v. Rogers, 56 Kan. 362, 43 P. 256.

it is generally held that the case should be postponed or continued to a time when that issue can be submitted to a jury.[49]

§ 500. In civil cases

In civil cases, very much the same rule appertains. Where the probable insanity of either the plaintiff or defendant is brought to the attention of the trial court, he should proceed to inquire into it, either by personal inspection and examination of the party, or through an examination made by physicians or alienists; and if it appears probable that the party is so mentally deficient that he would be at a disadvantage in prosecuting or defending the case, a postponement or continuance should be taken until a guardian ad litem or other proper representative can be appointed to carry on the litigation for the insane litigant.[50]

§ 501. Intoxication as ground for continuance

The intoxication of either party to a suit, when the same is called for trial, may be made the basis for a motion for continuance, especially if the intoxication has been for a protracted period, clouding the mental faculties, so that he is not capable of conducting his case; but the courts do not look kindly on such an application, because the disadvantage accruing to him is brought about by his own fault, and would, if regularly allowed, enable a defendant, or other litigant, to continue a case at his pleasure. Yet the spirit of justice can hardly allow a person to be put on trial where he is too intoxicated to make any defense to the charge brought against him, or to prosecute or defend his rights in a civil action, when a postponement might be taken for a short time and the person allowed to sober up, especially as a repetition can be guarded against by the confinement of the accused in a criminal case, or by refusal of a second postponement in a civil case. The matter is usually held to be within the sound discretion of the trial judge, who has before him all the

[49] Gruber v. State, 3 W. Va. 699; People v. Farrell, 31 Cal. 576.
[50] Nix v. State, 20 Okl. Cr. 373, 202 P. 1042, 26 A. L. R. 1053.

circumstances and can do justice in the particular case.[51] The courts have not been inclined to grant continuances based on the insanity or intoxication of an attorney in the case, as the litigant had the selection of the attorney, and is charged with the fault in his selection;[52] but the discretion of the trial court is broad enough to protect the rights of the litigant in such matters, and where seasonable complaint is made to the court by a litigant to the effect that his counsel is mentally unable to conduct the case, and it does not appear that such party is in fault, the trial judge should allow sufficient delay to procure other counsel.

§ 502. Instruction, in general

Where the issue of insanity is raised by pleading and evidence, and a jury is being used in the case, written instructions should be given with respect to such issues.[53] In general, they need only to conform to the general form of instructions to a jury in use in the forum, should be framed in clear and easily understood terms consistent with scientific determination,[54] and should apply to the particular case under determination and conform to the facts thereof.[55] In some jurisdictions, the courts are allowed to caution the jury to weigh the evidence carefully, and to beware of pretended insanity and ingenious counterfeits of the same;[56] but care should be taken to avoid any expression which will tend to cast discredit or suspicion on the defense of insanity being made in good faith.[57] In those states where the trial judge is not allowed under the local practice to

[51] Branch v. State, 35 Tex. Cr. R. 304, 33 S. W. 356; State v. Ellvin, 51 Kan. 784, 33 P. 547.

[52] State v. Bethune, 93 S. C. 195, 75 S. E. 281; Territory v. Clark, 13 N. M. 59, 79 P. 708.

[53] See ante, §§ 503, 504.

[54] Oldham v. People, 61 Colo. 413, 158 P. 148.

[55] Stewart v. State (Tex. Cr. App.) 77 S. W. 791.

[56] People v. Allender, 117 Cal. 81, 48 P. 1014.

[57] Aszman v. State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33; State v. Crowe, 39 Mont. 174, 102 P. 579, 18 Ann. Cas. 643; State v. Barry, 11 N. D. 453, 92 N. W. 809.

charge on the weight of the evidence, we would suggest that the better practice would be to avoid any expressions in the instructions which would tend to cast a greater onus on the issue of insanity than cast on any of the other issues.[58] While approved definitions of insanity may be given, to aid the jury in determining whether the person in question is mentally defective or insane,[59] yet mere kinds and classes of insanity and mental derangement as such should not be emphasized. Such matters are more within the realm of medical research, and the law is only interested in determining the mental capacity with reference to the act in question. The instructions should therefore state the rules of accountability to the law under the facts of the case, rather than attempt to define insanity or any of its forms.[60] Since the existence, character, and extent of insanity is a question for the jury to determine,[61] it is error to instruct that a certain belief, etc.,[62] is a delusion,[63] since the question of what facts amount to a delusion or other form of insanity is a question for the jury.

The province of the court and jury in passing on the existence and application of a delusion is quite well defined. What will constitute a delusion is a question for the court to define in proper instructions, but whether the facts of the case before them bring it within the definition laid down by the court is a question of fact for the jury.[64] The rule is well stated by Justice Henry, of the Supreme Court of Texas, as follows: "What constitutes an insane delusion, and its effect upon the testator's

[58] See authorities under notes 56, 57; Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 P. 856, 36 P. 813.

[59] Davis v. U. S., 165 U. S. 378, 17 S. Ct. 360, 41 L. Ed. 754.

[60] Oldham v. People, 61 Colo. 413, 158 P. 148.

[61] Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408.

[62] Prather v. McClelland, 76 Tex. 574, 13 S. W. 543; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

[63] People v. Hubert, 119 Cal. 218, 51 P. 329, 63 Am. St. Rep. 72.

[64] Manley's Ex'r v. Staples, 65 Vt. 370, 26 A. 630; People v. Hubert, 119 Cal. 216, 51 P. 329, 63 Am. St. Rep. 72; Owen v. Crumbaugh, 228 Ill. 400, 81 N. E. 1051, 119 Am. St. Rep. 442, 10 Ann. Cas. 606.

capacity, are questions of law. Whether or not the testator came within the definition is a question of fact, to be found by the jury from the evidence." [65] In this connection, it is held that a matter of science, as to one being possessed of delusions, is a matter of fact, and the court cannot instruct that certain facts constitute such a delusion, but the question must be submitted to the jury.[66] In short, the court should furnish the rule, but the jury must apply it to the facts, and decide whether or not they measure up to it. Of course, where no facts are offered that can properly be considered as evidence of this state of mind, the court may and should refuse to submit it to the jury.[67]

It is said that requested instructions, purporting to set out arguments and explanations of courts and text-writers as to the variety of forms in which insanity may show itself, the difficulty of determining between perfect and partial insanity, etc., should not be given.[68] However, if the main charge to the jury does not cover all the facts, so as to present any reasonable theory deducible therefrom, a special charge should be given covering such point or points, as will be seen more particularly under special heads hereinafter discussed. Such instruction should contain clear statements of the rules for testing the sufficiency of the insanity applicable to the case, and should state the rule with reference to presumptions, as, for example, that the defendant is presumed to be sane until the contrary is established.[69] It has also been held proper to charge that, when it has once been decided one is chronically insane, or that he has been adjudged to be of unsound mind, he is presumed to continue in that state until the contrary is shown.[70]

[65] Prather v. McClelland, 76 Tex. 574, 13 S. W. 543.

[66] People v. Hubert, 119 Cal. 216, 51 P. 329, 63 Am. St. Rep. 72.

[67] Prather v. McClelland, 76 Tex. 574, 13 S. W. 543.

[68] Holton v. State, 137 Ga. 86, 72 S. E. 949; People v. Holmes, 111 Mich. 364, 69 N. W. 501.

[69] Matheson v. U. S., 227 U. S. 540, 33 S. Ct. 355, 57 L. Ed. 631. Contra: Missouri Pac. Ry. Co. v. Brazzil, 72 Tex. 233, 10 S. W. 408.

[70] Kaack v. Stanton, 51 Tex. Civ. App. 495, 112 S. W. 704, writ of error refused.

§ 503. In civil cases, in general

Where the issue of insanity is raised by the pleading and evidence in a civil case,[71] the issue should be presented to the jury, covering every theory of the case advanced by either side.[72] The instruction should, of course, conform to the pleading and evidence, and the issue should not be submitted when not raised by either.[73] It should contain a clear statement of the rules of law governing the alleged insane person's accountability under the facts of the case, and give the jury some gauge by which to determine whether such person has sufficient mental capacity to meet the test. For example, upon the issue of insanity at the time of execution of a deed, it was proper to instruct the jury that the deed should be set aside if "the grantor, at the time he executed the deed, did not possess the degree of mental capacity which would enable him to understand and act with discretion in the ordinary affairs of life;" [74] upon the issue of the effect of insanity upon a contract, it was held proper to submit to the jury the question whether the alleged non compos had "sufficient mental soundness and capacity to understand the nature, terms, and effect of such contract and transaction in detail, and as a whole to determine and appreciate the rights, benefits, values, and obligations which were exchanged therefor, to hold these elements of the details in his mind and reflect upon them rationally, and to exercise his mind in respect to them in a rational way;" [75] and upon the issue of capacity to make a will it has been held proper to instruct the jury that the "capacity required to render a man mentally competent to make a will exists when the testator

[71] Mowry v. Saunders, 33 R. I. 45, 80 A. 421, Ann. Cas. 1913A, 1344.

[72] Campbell v. Campbell, 35 R. I. 211, 85 A. 930; Brown v. Carmichael, 152 Ga. 353, 110 S. E. 3.

[73] Kaack v. Stanton, 51 Tex. Civ. App. 495, 112 S. W. 702, writ of error refused; Mowry v. Saunders, 33 R. I. 45, 80 A. 421, Ann. Cas. 1913A, 1344.

[74] Raymond v. Wathen, 142 Ind. 367, 41 N. E. 815.

[75] Smith v. Guerre (Tex. Civ. App.) 175 S. W. 1093.

has will, mind, and memory to sufficiently understand that he is selecting the person or persons whom he wishes to have his property, and to know his property and the natural objects of his bounty, and his duties to them and to the persons upon whom the property is bestowed by the testamentary paper which he signs, and to make such disposition in accordance with a then settled purpose of his own." [76] It would seem that it is competent for the court to set out in his instructions to the jury the circumstances under which legal presumptions might arise with reference to the transaction in question. For example, it has been held proper to charge that, "when a man becomes chronically of unsound mind, he is presumed to continue in such condition until the contrary is proven," and, "when one is adjudged to be of unsound mind, then he is presumed to be in that condition until the contrary is proven." [77] The burden of proof is, except where changed by express statute, the same as in other civil actions, and similar instructions should be given covering the same.

§ 504. In criminal cases, in general

If there is any evidence tending to show insanity of a defendant at the time of a crime for which he is being tried, the issue should be submitted to the jury; [78] and this is true, even though the evidence of insanity is weak and there is apparently stronger evidence to the contrary,[79] because the question of insanity is for the jury to decide. Even where it was not pleaded, or seemingly relied upon, as a defense, if the evidence introduced tends to fairly raise the issue, the question of insanity should be sub-

[76] Bramel v. Bramel, 101 Ky. 64, 39 S. W. 522.

[77] Kaack v. Stanton, 51 Tex. Civ. App. 495, 112 S. W. 702, writ of error refused.

[78] McClure v. Com., 81 Ky. 448; Kirby v. State, 68 Tex. Cr. R. 63, 150 S. W. 455; Patterson v. State, 124 Ga. 408, 52 S. E. 534; Cochran v. State, 65 Fla. 91, 61 So. 187; Territory v. Kennedy, 15 N. M. 556, 110 P. 854; State v. Rippy, 104 N. C. 752, 10 S. E. 259.

[79] State v. Newman, 57 Kan. 705, 47 P. 881.

mitted in the instructions to the jury,[80] because the plea of not guilty is generally sufficient to raise the issue.[81] Where the issue of insanity is not raised by either the evidence or the circumstances surrounding the commission of the crime, instructions on the issue would not be proper.[82] Whether there is any evidence of insanity is for the determination of the trial judge, as is the sufficiency of the evidence of any fact to go to the jury; but it seems fairly well settled that mere evidence of intoxication will not be sufficient to justify a charge on the issue of insanity.[83] Where full instructions in general have been given on the issue of insanity, it is sufficient, without instructing on the effect of particular kinds of insanity, as, for example, insanity induced by intemperate use of drugs;[84] but where an attempt is made to charge on any one kind or phase of insanity, all kinds and phases of insanity raised by the evidence should be presented in the charge, so that equal prominence will be given to the several theories of the defense with reference to the defendant's sanity.[85] Where the evidence of insanity offered at the trial indicated that it was continuous in its nature, and existed, if at all, at the time of the commission of the offense, it is sufficient to submit the issue of defendant's insanity at the time of the commission of the offense, without submitting its existence at the

[80] Patterson v. State, 124 Ga. 408, 52 S. E. 534; State v. Branton, 33 Or. 533, 56 P. 267.

[81] French v. State, 85 Wis. 400, 55 N. W. 566, 21 L. R. A. 402, 39 Am. St. Rep. 855; People v. McElvaine, 125 N. Y. 596, 26 N. E. 929; Youtsey v. U. S., 97 F. 937.

[82] Mikeska v. State, 79 Tex. Cr. R. 109, 182 S. W. 1127; Hopkins v. State, 4 Okl. Cr. 194, 108 P. 420, 111 P. 947; People v. Slack, 90 Mich. 448, 51 N. W. 533; McConnell v. State, 22 Tex. App. 354, 3 S. W. 699, 58 Am. Rep. 647; Com. v. Cressinger, 193 Pa. 326, 44 A. 433; State v. Hartley, 22 Nev. 342, 40 P. 372, 28 L. R. A. 33.

[83] Vallereal v. State (Tex. Cr. App.) 20 S. W. 557; Wilkerson v. Com., 88 Ky. 29, 9 S. W. 836; State v. Kidwell, 62 W. Va. 466, 59 S. E. 494, 13 L. R. A. (N. S.) 1024.

[84] State v. Mahn, 25 Kan. 182.

[85] State v. Rippy, 104 N. C. 752, 10 S. E. 259; State v. Craig, 52 Wash. 66, 100 P. 167.

time of the trial.[86] But, of course, where the evidence raises the issue of insanity subsequent to the commission of the act, and continuing up to the time of the trial, such issue should be submitted, especially when requested by the defendant. The instructions should give the jury some rule by which to determine the defendant's capacity to commit the crime in question.[87] For example, in those states where the "so-called right and wrong" test is recognized, the charge should submit the question as to whether the defendant, at the time of the act, "was laboring under disease of the mind to such an extent as that he did not know right from wrong, and did not know that the act was wrong." [88] Since the purpose of the verdict is not to determine whether the defendant is afflicted with any particular kind of insanity or delusion, but whether he is so far affected as to deprive him of being incapable of distinguishing between the right and wrong—i. e., the issue is not that of insanity, but of responsibility—it is not necessary to give precise and technical definition of kinds of insanity and insane delusions,[89] unless it is necessary to distinguish between two kinds of insanity, where one is a defense to crime and the other is not.[90] The instruction should clearly define the burden of proof. While there is some conflict as to this, the general rule is that, when the issue of defendant's insanity is injected into the case by a preponderance

[86] Lester v. State, 69 Tex. Cr. R. 426, 154 S. W. 556.

[87] Smith v. State, 182 Ala. 38, 62 So. 184; Com. v. Hallowell, 223 Pa. 494, 72 A. 845; People v. Holmes, 111 Mich. 364, 69 N. W. 501; State v. Craig, 52 Wash. 66, 100 P. 167; Coppenhaver v. State, 160 Ind. 540, 67 N. E. 453.

[88] Lester v. State, 69 Tex. Cr. R. 426, 154 S. W. 556; State v. Knight, 95 Me. 467, 50 A. 278, 55 L. R. A. 373; Kearney v. State, 68 Miss. 233, 8 So. 292; People v. Mills, 98 N. Y. 176; Lowe v. State, 118 Wis. 641, 96 N. W. 417; State v. Palmer, 161 Mo. 152, 61 S. W. 651; State v. Warner, 93 Kan. 378, 144 P. 220.

[89] Wilcox v. State, 94 Tenn. 106, 28 S. W. 312.

[90] Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811.

of the evidence, then the burden is upon the state to prove the defendant's sanity along with the other essential ingredients of the charge beyond a reasonable doubt.[91] It seems to be proper to charge the jury that the defendant is presumed to be sane until he has overcome that presumption by proving his insanity by a preponderance of the evidence.[92] Some of the authorities approve instructions to the jury that the defendant should prove his insanity "to the satisfaction of the jury by a preponderance of the evidence," where it appears elsewhere in the charge that the language is not intended to mean that the defendant is required to prove the insanity beyond a reasonable doubt.[93] But, the presumption of sanity having been overcome, and the insanity of the defendant put in issue by the evidence, it is required that the charge on the whole case direct, unless the state prove the defendant's sanity beyond a reasonable doubt, that the defendant should be acquitted.[94] In at least two of the states, California and Louisiana, it seems that the jury should be charged that the defendant is required to prove his insanity by a preponderance of the evidence.[95] Charges which belittle and disparage

[91] Davis v. U. S., 165 U. S. 373, 17 S. Ct. 360, 41 L. Ed. 750. See ante, § 534.

[92] Com. v. Eddy, 7 Gray (Mass.) 584; Morse v. State, 68 Tex. Cr. R. 351, 152 S. W. 928; Duthey v. State, 131 Wis. 178, 111 N. W. 222, 10 L. R. A. (N. S.) 1032; State v. Crowe, 39 Mont. 174, 102 P. 579, 18 Ann. Cas. 643; Hamblin v. State, 81 Neb. 148, 115 Neb. 850, 16 Ann. Cas. 569; State v. Crowe, 39 Mont. 174, 102 P. 579, 18 Ann. Cas. 643.

[93] Stanfield v. State, 50 Tex. Cr. R. 69, 94 S. W. 1057; State v. Porter, 213 Mo. 43, 111 S. W. 529, 127 Am. St. Rep. 589; Minder v. State, 113 Ga. 772, 39 S. E. 284; Com. v. Kilpatrick, 204 Pa. 218, 53 A. 774.

[94] Davis v. U. S., 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499; Com. v. Johnson, 188 Mass. 382, 74 N. E. 939; Stanfield v. State, 50 Tex. Cr. R. 69, 94 S. W. 1057; O'Connell v. People, 87 N. Y. 377, 41 Am. Rep. 379.

[95] People v. Allender, 117 Cal. 82, 48 P. 1014; State v. Scott, 49 La. Ann. 265, 267, 21 So. 271, 277, 38 L. R. A. 736.

the defense of insanity should not be given as a rule,[96] since the defense of insanity is a legal defense, which the defendant has a right to offer, and it should be given the same fair consideration as any other lawful defense.

§ 505. On intoxication as a defense

Where intoxication is properly set up as a defense, and the evidence in the case actually raises the issue, such defense should be presented to the jury by applicable instructions.[97] Some authorities hold that this should be done, even where intoxication is not interposed as a defense, where the evidence shows it to be a fact.[98]

§ 506. Motion and record on appeal

While the suggestion of insanity, especially in a criminal case, can be made verbally, or the court may act of its own motion, without a motion being made, where the insanity of the defendant or litigant is evident, yet it is the better practice to make a formal motion and support it by affidavits and reports of physicians and alienists where possible. Where there will likely not be a sufficient record on appeal to show that the question was brought before the court by motion, it should be made to appear of record by a bill of exceptions,[99] or, possibly, by an order in the minutes or judgment rolls, reciting the fact that the motion was brought to the attention of the court and overruled.

[96] People v. Methever, 132 Cal. 326, 64 P. 481; Aszman v. State, 123 Ind. 347, 24 N. E. 123, 8 L. R. A. 33.

[97] Winter v. State, 123 Ala. 1, 26 So. 949; Maynard v. State (Tex. Cr. App.) 39 S. W. 667; Cross v. State, 55 Wis. 261, 12 N. W. 425; Bleich v. People, 227 Ill. 90, 81 N. E. 36; People v. Hill, 123 Cal. 47, 55 P. 692.

[98] Bleich v. People, 227 Ill. 80, 81 N. E. 36.

[99] Branch v. State, 35 Tex. Cr. 304, 33 S. W. 356.

CHAPTER 17

JUDGMENT AND REVIEW

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§ 507. Judgment for non compos—Force of

As we have seen supra,[1] an insane person ordinarily has capacity to sue, and it follows that a judgment is not, as a general rule, nonenforceable because the plaintiff was insane at the time it was rendered.[2] However, where the judgment is against the best interests of the non compos, equity has jurisdiction to reform it, so that it will conform to the ends of justice with respect to the rights of the non compos plaintiff. In the same manner, the non compos is ordinarily bound by judgments entered on actions brought by his committee.[3]

[1] See supra, § 473.

[2] Speck v. Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213; Menz v. Beebe, 95 Wis. 383, 70 N. W. 468, 60 Am. St. Rep. 120; Wilkinson v. Lehman-Durr Co., 150 Ala. 464, 43 So. 857, 124 Am. St. Rep. 75.

[3] Willis v. Mason, 140 Ky. 88, 130 S. W. 964.

§ 508. Judgment against non compos—Force of

On the face of the authorities, there is apparently a wide difference of opinion as to the force of a judgment entered against a non compos. By some authorities it has been held that a judgment entered against an insane person, who is without guardian to represent him in the litigation, is a nullity.[4] Other authorities hold that such a judgment is voidable only, but good as against collateral attack, and can only be set aside by direct proceedings in equity.[5] As most of the authorities under the first group we have mentioned recognize that such a judgment can only be attacked by direct proceedings, the difference in the two lines of authority consists rather in the use of different words than in the effect of the judgment itself, and is more apparent than real, and the rule is well established that a judgment against an insane person is binding until set aside by direct proceeding in conformity with the practice of the forum, and is not subject to collateral attack.[6] This rule is also supported by the better reasoning. In civil practice it is generally recognized that insanity is

[4] Taylor v. Lovering, 171 Mass. 303, 50 N. E. 612; Ex parte Kibler, 53 S. C. 461, 31 S. E. 274; Bicknell v. Spear, 38 Misc. Rep. 389, 77 N. Y. S. 920; Gillespie v. Gouly, 120 Cal. 515, 52 P. 816; Marquis v. Wiren, 74 Kan. 775, 87 P. 1135; Bond v. Neuschwander, 86 Wis. 391, 57 N. W. 54.

[5] White v. Hinton, 3 Wyo. 753, 30 P. 953, 17 L. R. A. 66; Howell v. Fidelity Lumber Co. (Tex. Com. App.) 228 S. W. 181; Withrow v. Smithson, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762; Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 492; Vance v. Ellerbe, 150 La. 388, 90 So. 735; Maloney v. Dewey, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131.

[6] Cooper v. Greenleaf, 84 Kan. 499, 114 P. 1086, 35 L. R. A. (N. S.) 1090; Maloney v. Dewey, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131; White v. Farley, 81 Ala. 563, 8 So. 215; Allison v. Taylor & Washburn, 6 Dana (Ky.) 87, 32 Am. Dec. 68; Ewing v. Wilson, 63 Tex. 88; Pollock v. Horn, 13 Wash. 626, 43 P. 885, 52 Am. St. Rep. 66; Judd v. Gray, 156 Ind. 278, 59 N. E. 849; Howell v. Fidelity Lumber Co. (Tex. Com. App.) 228 S. W. 181; Spence v. State Nat. Bank (Tex. Civ. App.) 294 S. W. 618.

a matter of defense, which a party to the suit must plead and prove in order to take advantage of it.[7] It is equally well settled as a matter of practice that all men are presumed to be sane until that presumption is overcome by competent evidence.[8] Therefore, where the record in a case shows that proper service has been had, or the defendant is present without any suggestion being made that he is incapable by reason of insanity of making his defense, the court may properly proceed to judgment upon the assumption that all the parties are mentally capable of protecting their respective interests in the matter, since it is the duty of neither the court nor the adverse parties to inquire into a litigant's sanity, so long as it stands unquestioned by appearance or suggestion.[9]

A judgment so entered against an insane defendant has been held to be sufficient to pass title to property involved, until set aside by proper proceedings,[10] and serves to fix the right of the parties to the action so long as it remains unquestioned.[11] To have such effect, however, it is usually held that such judgment should be against the non compos in his own name rather than against his guardian or committee.[12] Where the judgment on its face shows that it is against a person under guardianship, it loses much of the force given by the presumption that the parties were sane.

[7] See supra, § 483.

[8] See ante, § 524.

[9] King v. Robinson, 33 Me. 114, 54 Am. Dec. 614.

[10] Tomlinson's Lessee v. Devore, 1 Gill (Md.) 345.

[11] Stigers v. Brent, 50 Md. 214, 33 Am. Rep. 317.

[12] Scott v. Winningham, 79 Ga. 492, 4 S. E. 90; Taylor v. Lovering, 171 Mass. 303, 50 N. E. 612; Walker v. Clay, 21 Ala. 797; Redmond v. Quincy, O. & K. C. R. Co., 225 Mo. 721, 126 S. W. 159.

§ 509. Exceptions to the rule

There seem to be two exceptions to the general rule that a judgment against an insane person regular on its face cannot be attacked collaterally. It has been held that, where great fraud and imposition has been practiced upon the insane party to a suit which for any reason cannot be reached and set aside by direct attack, courts of equity will not strictly apply the rule protecting such judgments against collateral attack.[13] This rule, or rather exception to the rule, seems to arise out of the necessity of the case, and is a means used by courts of equity to throw open to collateral attack abuses which cannot be reached and corrected by direct means.

Secondly, it sometimes happens that the judgment entered against the non compos party is founded upon a cause of action which can not be maintained against an insane person. For example, such suit may be founded on an action for libel and slander, and it is well settled that such an action cannot be maintained against a non compos person, because he is incapable of maintaining the malicious intent which is an essential ingredient of the cause of action; the purported slanderous words being but the irresponsible ravings of a disordered mind. In a case of this kind, it is apparent upon the face of the record that the judgment has no foundation in law or equity, and it may be treated as a nullity, and execution on it may be enjoined as issued on a void judgment.[14]

[13] Newcomb's Ex'rs v. Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222; Gillespie v. Gouly, 120 Cal. 515, 52 P. 816.

[14] Horner v. Marshall's Adm'x, 5 Munf. (19 Va.) 466.

§ 510. Judgment by default

Because of the ex parte nature of the proceeding, and the opportunity thereby given for imposition, the courts do not look with favor upon a judgment rendered against a non compos by default.[15] It is therefore held that a default judgment should not, ordinarily, be rendered against an insane defendant.[16] It is the better practice to have a guardian ad litem appointed and proceed to a hearing on the merits, for in that case the courts will be much more inclined to let the judgment stand.[17] However, where judgment by default has been entered, it will not be void merely because the defendant was insane,[18] but will be subject to review and correction much in the same way as other judgments against such persons, and scrutinized very closely. It has been held in some jurisdictions that want of proper representation, viz., guardian ad litem, etc., of an insane defendant, is a jurisdictional defect, which will render the judgment taken therein void;[19] but we think the generally accepted rule is that such a judgment is voidable only, and binding until set aside by proper proceeding.[20]

[15] Taylor v. Lovering, 171 Mass. 303, 50 N. E. 612; Leach v. Marsh, 47 Me. 548, 74 Am. Dec. 503; McAllister v. Lancaster Co. Bank, 15 Neb. 295, 18 N. W. 57.

[16] Leach v. Marsh, 47 Me. 548, 74 Am. Dec. 503; Sturges v. Longworth, 1 Ohio St. 544; Eakin v. Hawkins, 52 W. Va. 124, 43 S. E. 211; Alexander v. Ticknor, 1 Phila. (Pa.) 120.

[17] Eggert v. Eggert, 144 Mich. 182, 107 N. W. 920; Little v. Little, 79 Mass. (13 Gray) 264; Wurster v. Armfield, 175 N. Y. 256, 67 N. E. 584.

[18] Allison v. Taylor, 6 Dana (Ky.) 87, 32 Am. Dec. 68.

[19] Ex parte Kibler, 53 S. C. 461, 31 S. E. 274; United States Trust Co. of New York v. Kiddle, 95 Misc. Rep. 381, 158 N. Y. S. 1011.

[20] Bundick v. Moore-Cortes Canal Co. (Tex. Civ. App.) 177 S. W. 1030; Evans v. Davis, 146 Ark. 595, 226 S. W. 520; Johnson v. Cook, 179 Mich. 117, 146 N. W. 343; Bobell v. Wagenaar, 106 Or. 232, 210 P. 711; Cecil's Committee v. Cecil, 149 Ky. 605, 149 S. W. 965.

§ 511. Agreed and confessed judgment

Since an insane person is without capacity to contract or give assent to any act involving a substantial right, it is obvious that a judgment based on his consent or confession is improper.[21] However, such a judgment, once entered, is not void, but merely voidable, in accordance with the general rule governing judgments against insane persons,[22] and is binding until set aside, unless it comes under one of the exceptions discussed under section 509. It has been held that a judgment confessed by the guardian is binding on the insane ward.[23]

§ 512. Judgment of expulsion from beneficial order

An interesting question has arisen in this connection, where judgment of expulsion has been entered by a beneficial order against a member too mentally deficient to appear and answer the complaint upon which his expulsion was founded. It was contended in behalf of the insane member that the rules of an order requiring members to appear and answer complaints against them by necessary implication only applied to sane members, as it would be a vain thing and a mockery to require a lunatic to appear and defend himself, or otherwise take part in a proceeding he was mentally incapable of understanding, and that as an insured he and his beneficiaries should not be deprived of their rights in the beneficial fund of the order by an ex parte "star chamber" proceeding, where he was incapable of presenting his side of the matter. However, it is held that, as the inner workings of a lodge or order are largely within the discretion of the body, a decision by it would be conclusive of all questions of inquiry before it; and this would be true, with added force, where

[21] Denni v. Elliott, 60 Tex. 337; Glasscock v. Tate, 107 Tenn. 486, 64 S. W. 715.

[22] Craddock v. Brinkley, 177 N. C. 125, 98 S. E. 280; Glasscock v. Tate, 107 Tenn. 486, 64 S. W. 715; Denni v. Elliott, 60 Tex. 337.

[23] McAden v. Hooker, 74 N. C. 24.

the absent insane member was represented by a fellow member appointed to present the insane member's side of the question.[24]

§ 513. Innocent purchasers—Rights of

After the rendition of judgment, it frequently happens that persons having no notice of the incompetency of one of the parties to the judgment acquire valuable rights in the subject-matter of the suit. In such case, a new question is presented with reference to the possible rights of such innocent purchaser. With reference to this it has been held that public policy required that such innocent third parties should be protected, and that their rights should stand unquestioned, since it would unsettle property rights generally if a judgment which seemed to settle titles could be overturned, and purchasers in good faith caused to lose their acquired rights. It is therefore held that a judgment, otherwise regular, will not be set aside on the grounds of insanity of one or more of the parties thereto, where the rights of subsequent purchasers in good faith have intervened, at least on collateral attack.[25] The remedy in such case would then be against the sane party who wrongfully secured the judgment.[26]

[24] Pfeiffer v. Weishaupt, 13 Daly (N. Y.) 161; Dodd v. Armstrong, 18 Phila. (Pa.) 399.

[25] Crawford v. Thomson, 161 Ill. 161, 43 N. E. 617; Rau v. Katz, 26 La. Ann. 463; Dunn v. Dunn, 114 Cal. 210, 46 P. 5; Heard v. Sack, 81 Mo. 610; Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 488.

[26] Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 180, 111 Am. St. Rep. 827; Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 488.

§ 514. Attachment liens, etc.—Force of

Inasmuch as an insane person is ordinarily subject to suit and judgment, there seems to be no valid reason why attachment and similar process cannot be run against such a person in proper cases, especially where necessary to the end of judicial procedure. For example, under the settled rule of the American states, it is necessary to attach property within the state in order to secure a basis for a judgment against a person beyond the borders of the state, and on whom personal service cannot be secured within the state, and in this connection it is held that, where the ground of an attachment is the nonresidence of the person against whom it is directed, the attachment will hold, notwithstanding the fact that such person is insane.[27] The same rule would likely apply where the residence of the non compos was unknown and that fact is made the grounds for the attachment.

But it is held that this rule will not apply where the ground of the attachment has to do with the mental attitude of the defendant. The reason is obvious. Where the issuance of an attachment or other process is necessarily based upon a certain mental attitude, and the defendant by reason of his mental weakness is incapable of entertaining such a mental attitude, such attachment would be without grounds and nonmaintainable.[28] For example, an attachment issued on the ground that the defendant had left the state with the *intent* of defrauding his creditors should be vacated on a showing that the defendant was insane at the time, since such a person would be wholly incapable of entertaining an intent to defraud.[29]

[27] Weber v. Weitling, 18 N. J. Eq. 441.

[28] Chambers & McKee Glass Co. v. Roberts, 4 App. Div. 20, 38 N. Y. S. 301, 73 N. Y. St. Rep. 668.

[29] Ross v. Edwards, 52 Ga. 24.

§ 515. Enforcement of judgment against non compos

In line with the rule that a judgment against an insane person is prima facie valid, and stands as a valid judgment against his estate until set aside by direct proceedings, it is generally held that execution on such judgment may issue and be levied on the insane person's property,[30] and that sale made thereunder cannot be collaterally attacked,[31] and the rights of purchasers will be protected.[32] However, this rule is subject to numerous exceptions, which vary under the statutory provisions and procedure of the respective states. In this connection, the judgment lien usually follows the enforceability of the judgment itself, and as a general rule it is a lien on the real estate of the non compos.[33] A distinction is usually made between a judgment secured against an insane person before inquisition and a judgment secured after inquisition, or after such non compos is under guardianship. In the latter case, it is generally held that the property of the non compos after inquisition and guardianship is in custodia legis, and not subject to execution, but that the claim represented by such judgment must be presented to the guardian or committee and allowed under the probate proceeding of the forum;[34] and in this connection it is usually held that, where

[30] Deberich Bros. & Co. v. Redman's Com., 5 Ky. Law Rep. 325; Wilkinson, Gaddis & Co. v. Markert, 65 N. J. Law, 518, 47 A. 488; Ward v. Miller, 143 Ga. 164, 84 S. E. 480; Pollock v. Horn, 13 Wash. 626, 43 P. 885, 52 Am. St. Rep. 66; Davis v. Drew, 6 N. H. 399, 25 Am. Dec. 467; Peters v. Townsend, 93 Ark. 103, 124 S. W. 255.

[31] White v. Farley, 81 Ala. 563, 8 So. 215; Thomas v. Hunsucker, 108 N. C. 720, 13 S. E. 221; Allison v. Taylor, 6 Dana (Ky.) 87, 32 Am. Dec. 68. See supra, note 5.

[32] Ward v. Miller, 143 Ga. 164, 84 S. E. 480; Evans v. Davis, 146 Ark. 595, 226 S. W. 520; Crawford v. Thomson, 161 Ill. 161, 43 N. E. 617.

[33] Johnson v. Pomeroy, 31 Ohio St. 247; Appeal of Wright, 8 Pa. 57.

[34] Nolan v. Garrison, 156 Mich. 397, 120 N. W. 977; Wesley v. Wood, 72 Misc. Rep. 258, 131 N. Y. S. 109; Saunders v. Mitchell, 61 Miss. 321; Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44.

the judgment was secured after inquisition or guardianship, the judgment lien will not attach.[35] However, it seems to be held, in those states where a creditor is not required to present his claim for allowance, that execution may issue and a levy be made, notwithstanding the fact that the lunatic is under guardianship.[36] In some jurisdictions it is held that where suit is brought, judgment secured, and execution issued and levied with knowledge that the defendant was insane, execution sale made in pursuance thereof would pass no title;[37] but this is not the general rule, unless the circumstances of the case are such as to show fraud or imposition on the part of the creditor, and would likely not apply to an innocent purchaser under the execution sale, or subsequent transferee without notice. Where justice requires it, it has been held that discovery in aid of execution may be ordered against an insane debtor.[38]

§ 516. Grounds for review of judgment

It not infrequently happens that, after a trial court has passed on a litigated matter, it is found that one of the parties defendant was insane at the time of the trial, and therefore unable to prepare and present his defense, or to protect himself against possible imposition. While public policy requires that judgments of the courts should not be held lightly, especially where they seemingly settle property rights, yet common justice requires that they be reopened, where they are founded on conditions which are inequitable and the rights of innocent third parties have not intervened. The fact that the insane defendant

[35] Estate of Streeper, 119 Pa. 178, 13 A. 72; Matter of Wing, 83 Hun, 284, 31 N. Y. S. 941.

[36] Adriance v. Brooks, 13 Tex. 279; Pollock v. Horn, 13 Wash. 626, 43 P. 885, 52 Am. St. Rep. 66; Morgan v. Hoyt, 69 Ill. 489.

[37] Gillespie v. Gouly, 120 Cal. 515, 52 P. 816; Coleman v. Commissioners of Lunatic Asylum, 6 B. Mon. (Ky.) 239; Sands v. Ruddick, 87 N. J. Eq. 99, 99 A. 101.

[38] Wilkinson, Gaddis & Co. v. Markert, 65 N. J. Law, 518, 47 A. 488.

made no objection to the judgment at the time of its entry, or even consented to it, will have little effect; it is not a matter of consent, the insane person having no capacity to give consent, but is merely a question of whether the facts favoring the non compos party to the suit were brought before the court in such manner as to enable the court to render a just and equitable decision. The mere fact that a party to the suit is insane is not sufficient. Parties having just claims against non compos persons have an undeniable right to have such claims reduced to a judgment, but they must not take advantage of the unfortunate condition of the incompetent party to secure more than they are entitled to.[39] It is therefore generally held that an equity court will inquire into such judgments, where one of the parties is shown to have been insane at the time of the trial; and where it appears that the rights of the insane party were properly respected, or that the judgment as entered was equitable, the judgment will be allowed to stand undisturbed;[40] but where it is found that the interests of the non compos were not protected properly by the appointment of a guardian ad litem or otherwise, and the judgment is itself inequitable, it will be set aside,[41] and especially where there is a showing of fraud or imposition on the part of the opposing party.[42]

[39] McNees v. Thompson, 5 Bush (Ky.) 686.

[40] Livingston v. Livingston, 166 N. Y. 601, 59 N. E. 1125; Foran v. Healy, 73 Kan. 633, 85 P. 751. See § 475.

[41] Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 493; Godde v. Marvin, 142 Mich. 518, 105 N. W. 1112; Hawley v. Griffin, 121 Iowa, 667, 97 N. W. 86.

[42] Ammon v. Wiebold, 61 N. J. Eq. 351, 48 A. 950; Gillespie v. Gouly, 120 Cal. 515, 52 P. 816; Sallier v. St. Louis, W. & G. R. Co., 114 La. 1090, 38 So. 868.

§ 517. Procedure in general

While the general rule allows judgments against insane persons to be set aside by direct proceedings where the judgment is inequitable, yet the method of attacking such judgment depends very largely upon the circumstances of the case and the local procedure. Where time allows, a motion for new trial in the original case may be made.[43] It is also held that the insanity of one of the parties to a judgment will bring it within the rule allowing a judgment to be set aside, where there has been a mistake as to facts or misinformation as to the status of the case, which has induced the court to render a decision or enter a judgment it would not have entered, had it been fully and correctly informed as to such matters,[44] and that it will be grounds for setting aside a judgment under a statute providing for the vacation of a judgment taken against a party through his "unavoidable casualty or misfortune." [45] In those jurisdictions where this contingency is provided for by express statute, the judgment will be set aside in accordance with the directions of such statute.[46] While there is some authority to the contrary,[47] it is generally conceded that a court of equity has jurisdiction to inquire into a judgment entered against an insane person, and to avoid the same, or to order a new hearing therein, where justice required it.[48]

[43] Pyle v. Pyle (Tex. Civ. App.) 159 S. W. 493.

[44] Consolidated Coal Co. of St. Louis v. Oeltjen, 189 Ill. 85, 59 N. E. 600; Judd v. Gray, 156 Ind. 278, 59 N. E. 849; State v. Jehlik, 66 Kan. 301, 71 P. 572, 61 L. R. A. 265.

[45] Small v. Reeves, 104 Ky. 289, 46 S. W. 726.

[46] Garretson v. Hubbard, 110 Iowa, 7, 81 N. W. 174.

[47] Howard v. Howard, 87 Ky. 619, 9 S. W. 411, 1 L. R. A. 610; Shaw v. Dixon, 6 Bush (Ky.) 644.

[48] See section 518, infra.

§ 518. Grounds for equitable proceedings

Since a judgment against an insane person is ordinarily voidable, and must be attacked by direct proceedings, the usual method of attack is by a proceeding in equity in the nature of a bill of review.[49] The ground of equity jurisdiction in such case is the inadequacy of the legal remedy, which justifies an intervention of equity courts to protect the rights of the incompetent;[50] and, this being true, a necessity for equitable relief must be shown before the court of equity can act. As a basis for relief, it must appear:

First, that the person against whom the judgment was taken was so mentally incompetent at the time the judgment was entered that he was unable to understand the nature and probable result of the proceeding, or to employ some competent person to guard his rights in connection therewith.[51] Where it appears that the defendant had sufficient mental capacity to understand and appreciate the nature and effect of the legal proceeding under which the judgment was taken, even though his mind was impaired at the time from bad health or other causes, and he was subsequently declared insane and a guardian appointed for him, the judgment will not be disturbed, inasmuch as the judgment of a court of competent jurisdiction should not be held lightly, and every reasonable presumption should be indulged in its fa-

[49] Haines v. West, 101 Tex. 226, 105 S. W. 1118, 130 Am. St. Rep. 839; Wilkinson v. Lehman-Durr Co., 150 Ala. 469, 43 So. 858, 124 Am. St. Rep. 75; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Dunn v. Dunn, 114 Cal. 210, 46 P. 5; Wynne v. Newman's Adm'r, 75 Va. 816; Noel v. Modern Woodmen of America, 61 Ill. App. 597; Lamprey v. Nudd, 29 N. H. 299; Wood v. Bayard, 63 Pa. 320; White v. Hinton, 3 Wyo. 753, 30 P. 953, 17 L. R. A. 66; Van Fleet Collateral Attack, § 616.

[50] Sternbergh v. Schoolcraft, 2 Barb. (N. Y.) 153; Frieseke v. Frieseke, 138 Mich. 458, 101 N. W. 632.

[51] McClain v. Davis, 77 Ind. 419; Leach v. Marsh, 47 Me. 548, 74 Am. Dec. 503.

vor.[52] Where the judgment is an agreed one, it must further appear that the alleged non compos defendant was insane, both at the time of the agreement and at the time of the entry of the judgment.[53] If he was sane at the time the stipulation for judgment was entered into, the entry of the judgment would be but the carrying out of the agreement made while such defendant was sane, and would not call for the interposition of a court of equity; while, if he was sane at the time the judgment itself was entered, it would be a ratification of an agreement made during insanity, and would be a judgment entered against a normal person, with which equity would have no grounds to interfere.

Second, it must appear that the insane person had a good defense to the suit, which he was prevented from presenting because of his insanity, or that such judgment was unfair or fraudulent.[54] The fact that one was insane at the time a judgment was entered against him will not of itself be sufficient ground for setting aside a judgment, in the absence of some showing of injury to the non compos by reason thereof;[55] and this applies equally to ordinary judgments and judgments entered upon a power of attorney to confess judgment.[56]

Third, where the non compos defendant is represented by a guardian ad litem or other accredited representative at the time the judgment is entered against him, there seems to be a third condition to setting it aside, viz.: There must be a showing of bad faith or overreaching on the part of the adverse party, or

[52] Spurlock v. Noe, 43 S. W. 231, 19 Ky. Law Rep. 1321, 39 L. R. A. 775.

[53] Brown v. Rentfro, 57 Tex. 327.

[54] Lee v. Heuman, 10 Tex. Civ. App. 668, 32 S. W. 94; Johnson v. Pomeroy, 31 Ohio St. 247; Dickerson v. Davis, 111 Ind. 433, 12 N. E. 145; Jones v. Crowell, 143 Ind. 218, 42 N. E. 612; King v. Robinson, 33 Me. 114, 54 Am. Dec. 614.

[55] Crippen v. Culver, 13 Barb. (N. Y.) 427.

[56] Spencer v. Reynolds, 9 Pa. Co. Ct. R. 249; Person v. Warren, 14 Barb. (N. Y.) 488; Hageman v. Salisberry, 74 Pa. 280.

on the part of the representative of the non compos defendant.[57] Where it appears that the non compos was represented either by attorney or guardian, who appeared for him in the case, the judgment will not be set aside, unless inequitable conduct is shown on the part of the purported attorney or guardian, or on the part of the adverse party, such as will amount to a substantial denial of justice,[58] and if no advantage appears to have been taken of the non compos the judgment will be allowed to stand.[59] Also the estate is subject to judgments priorly placed, as the rule making judgments against a non compos voidable only applies to those taken while the party is insane and without representation in the person of his attorney or guardian.[60]

The matter may be reviewed by writ of error, where the procedure of the forum allows it,[61] or the judgment may even be vacated by the court of his own motion,[62] or on motion of some normal person, accompanied by sufficient showing.

§ 519. Audita querela to stay execution

While the writ of audita querela has fallen into disuse, it was a remedy well recognized at common law,[63] and has found support in some of our American states, notably Vermont and Massachusetts. In a majority of the states it has been superseded by the more expeditious procedure, as by motion or similar proceedings. It is a proceeding at law, filling in that court very much the same office as an equitable action to set aside a

[57] Frieseke v. Frieseke, 138 Mich. 458, 101 N. W. 632; Ewing v. Wilson, 63 Tex. 88; McNees v. Thompson, 5 Bush (Ky.) 686.

[58] Finzer v. Nevin, 18 S. W. 367, 13 Ky. Law Rep. 773; Jones v. Crowell, 143 Ind. 218, 42 N. E. 612; Frieseke v. Frieseke, 138 Mich. 458, 101 N. W. 632; Wirth v. Weigand, 85 Neb. 115, 122 N. W. 714, 35 L. R. A. (N. S.) 1103.

[59] Eggert v. Eggert, 144 Mich. 182, 107 N. W. 920.

[60] See § 518, supra.

[61] Leach v. Marsh, 47 Me. 548, 74 Am. Dec. 503.

[62] Winslow v. McCarthy, 39 Cal. App. 337, 178 P. 720.

[63] 3 Bl. Com. 405, 406.

judgment brought on the equity side of the docket, and its office is to afford a means of vacating judgments in law courts which are unjust by reason of some matter which could not be presented on the trial at which judgment was taken, or which has arisen subsequent thereto.[64] In this connection it has been held that insanity of the defendant at the time a judgment was taken against him will be ground for vacating the judgment by a writ of audita querela.[65] While, as we have noted above, this proceeding has fallen into disuse, it is a common-law remedy, and can likely be used in any of the states where the common law has been adopted, except where local statutes or codes have superseded it.

§ 520. Appeal by non compos, in general

Appeal may be taken by the non compos or his guardian in the same manner as appeal is taken by normal parties. In such case it is held that the appeal need not wait the removal of the insane person's disabilities,[66] and that statutes and rules of the courts limiting the time within which an appeal may be taken do not ordinarily apply to insane parties.[67] Likewise appeal may be taken against an adverse party and his guardian or committee, and notice of such appeal may be served on the guardian.[68]

§ 521. Through guardian, etc.

The appeal should, as a rule, be taken and directed by the guardian.[69] It would seem that a next friend cannot ordinarily take an appeal, unless authorized to do so by the court appointing him.[70] The non compos may himself take an appeal during

64 Bouv. Law Dict. tit. "Audita Querela."
65 Lincoln v. Flint, 18 Vt. 247.
66 Finney v. Speed, 71 Miss. 32, 14 So. 465.
67 Witte v. Gilbert, 10 Neb. 539, 7 N. W. 288; Anderson v. Layton, 3 Bush (Ky.) 87.
68 See ante, § 481.
69 See ante, § 314.
70 See ante, § 314.

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a lucid interval.[71] Since it involves an exercise of reason, an insane person may not dismiss an appeal regularly taken in his behalf,[72] and the rule which allows a person to voluntarily dismiss an appeal has no application. In other respects, the general rules in regard to appellate practice in the forum apply.

§ 522. Removal to federal court

The federal courts afford the same protection to insane persons as they do to normal persons, and cases may be removed to the federal courts in the same manner as where the parties are normal. Where the removal is on the grounds of adverse citizenship, the vital question is usually whether the citizenship of the insane party or that of the guardian or committee will control. Ordinarily the citizenship or residence of the insane ward controls;[73] but where, under the statutes of the state where the appointment of the guardian or committee is made, such guardian or committee may bring the proceedings in his own name, then the residence of the guardian or committee is the controlling factor to determine whether the case may be removed.[74] Where judgment is entered in a federal court against a non compos, relief from the judgment should be sought in that court, as a state court has no control over the judgments of a federal court with respect to granting relief against them.[75]

[71] Formby v. Wood, 19 Ga. 581.

[72] Combs v. Combs, 82 S. W. 298, 26 Ky. Law Rep. 617.

[73] Wilcoxen v. Chicago, B. & Q. R. Co., 116 F. 444; Wiggins v. Bethune, 29 F. 51; Stout v. Rigney, 107 F. 545.

[74] Wiggins v. Bethune, 29 F. 51; Stout v. Rigney, 107 F. 545, 46 C. C. A. 459.

[75] Maloney v. Dewey, 127 Ill. 395, 19 N. E. 848, 11 Am. St. Rep. 131.

CHAPTER 18

RULES OF EVIDENCE

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§ 523. Rules of evidence, in general

The rules of law governing the amount and sufficiency of the evidence necessary to establish the status of the insane is one of the most important portions of the adjective law. It has, to a large extent, grown up within the last century, and is as yet unsettled in some of its phases. Since insanity itself is a *condition,* not a *thing,* it is not susceptible of the usual means of proof, and to this fact is due the unusual difficulty of making proof of its existence and measuring its effect, when once proven to exist. From its very nature, it is obvious that the person most concerned cannot be relied on to any appreciable extent as a witness, and as no man can look into the mind of another, the state of such mind can only be measured as the same is reflected in the actions of the body it is created to govern. The proof, therefore, should look to laying before the judicial agency, established to pass on the conditions of the mind in question, the physical manifestations of such mind, as expressed through the bodily action, together with such scientific knowledge and experience as will aid in interpreting these physical manifestations, and from these such agency must draw the proper inference; i. e., determine as a matter of fact whether the mind in question is normal, or sane, or whether it is abnormal, or insane.

It therefore follows, as the first and basic rule of such evidence, that the question of insanity vel non is a question of fact, and must be submitted to the jury under the constitutional rules

providing for jury trial as to questions of fact;[1] and this is true, whether the question arises in a civil [2] or in a criminal case.[3] As a matter of practice, it must be submitted as a separate issue, and not in connection with some other issue, such as undue influence, etc.[4]

§ 524. Presumption of sanity

At the threshold of the inquiry into the sanity of a person stands the presumption of the law that all men are sane.[5] The presumption is much of the same nature as that which presumes that all men are innocent until the contrary is proven. This is the result of both common experience and public policy. It is a matter of common experience that men are ordinarily sane, and, as a matter of public convenience and necessity, the members of society must be taken as sane in their ordinary relations with one another. Under the well-recognized rule of logic that known conditions are presumed to continue until they are shown to

[1] Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Rogers v. Armstrong Co. (Tex. Civ. App.) 30 S. W. 848; In re Alexander, 136 Mich. 518, 99 N. W. 746; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Hill v. Nash, 41 Me. 585, 66 Am. Dec. 266; Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422.

[2] McElroy's Case, 6 Watts & S. (Pa.) 451; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Carlisle v. Atchley, 165 Ala. 265, 51 So. 798; Grabill v. Barr, 5 Pa. 441, 47 Am. Dec. 418.

[3] State v. Newman, 57 Kan. 705, 47 P. 881; People v. Beverly, 108 Mich. 509, 66 N. W. 379; People v. Best, 39 Cal. 690; Ford v. State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117.

[4] Gwin v. Gwin, 5 Idaho, 271, 48 P. 295; Teegarden v. Lewis, 145 Ind. 98, 40 N. E. 1047; also see notes 1, 2, and 3, supra.

[5] In re Collins, 18 N. J. Eq. 253; Nimick v. Mut. Ben. Life Ins. Co., Fed. Cas. No. 10,266; Weed v. Mutual Ben. Life Ins. Co., 70 N. Y. 561; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422; Miller v. Rutledge, 82 Va. 863, 1 S. E. 202; Stevens v. Shannahan, 160 Ill. 330, 43 N. E. 350; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701.

have changed, the sanity of a person is presumed to continue until the contrary is proven.[6]

§ 525. Exception to rule

An exception to this rule is found where a person has been judicially determined to be insane. A person, once found to be insane by a proper judicial agency, is presumed to continue insane until he is shown to have recovered his reason,[7] under the axiom that conditions shown to exist are presumed to continue. In some jurisdictions, this is limited to cases where the insanity is of a permanent nature; and a finding of temporary insanity will not be sufficient to cover the general presumption of insanity,[8] especially when the derangement arises from accident, or some form of disease, from which the subject may be expected to recover.[9]

The practical application of this is found in the doctrine of "lucid interval," [10] which we will discuss in a subsequent section.[11]

[6] Corbit v. Smith, 7 Iowa, 60, 71 Am. Dec. 431; Taylor v. Creswell, 45 Md. 422; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Noel v. Karper, 53 Pa. 97; Grabill v. Barr, 5 Pa. 441, 47 Am. Dec. 418; Herndon v. Vick, 18 Tex. Civ. App. 583, 45 S. W. 852; Ford v. State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117; Meeker v. Boylan, 28 N. J. Law, 274; Pike v. Pike, 104 Ala. 642, 16 So. 689.

[7] See cases cited under note 6.

[8] Brown v. Riggin, 94 Ill. 560; Trish v. Newell, 62 Ill. 196, 14 Am. Rep. 79; Brandstrator v. Crow, 162 Ind. 362, 69 N. E. 668; Carpenter v. Carpenter, 8 Bush (Ky.) 283; Pike v. Pike, 104 Ala. 642, 16 So. 689.

[9] Trish v. Newell, 62 Ill. 196, 14 Am. Rep. 79; Clarke v. Sawyer, 3 Sandf. Ch. (N. Y.) 351.

[10] Supra, §§ 46, 47.

[11] Ante, § 527.

§ 526. Burden of proof, in general

As corollary to the rule that all men are presumed to be sane, it naturally follows that the burden of proving insanity is on the party seeking to set it up.[12] This is true, whether it is set up by the purported insane person or the opposite party. The rule is not only supported by the necessity of overcoming the presumption of sanity, but is a result of the general rule of evidence that the side having the affirmative of an issue usually also has the burden of proof.[13] This has been held to be true, even where one is seeking a release from an asylum,[14] but would apply only where there has been no regular adjudication of insanity.

§ 527. After adjudication of insanity

Where one has been adjudicated to be insane, the burden rests upon him who alleges it to establish his sanity in any proceeding in which his sanity may be an issue.[15] This naturally follows the presumption of the continuation of insanity, once shown to exist, and the consideration which must be given the judgment of a competent court. But this rule applies to permanent and continuing insanity, and it is usually held that, where temporary insanity alone is established, it will not be sufficient to overcome the presumption of sanity and shift the burden of proof.[16]

[12] Missouri Pac. Ry. Co. v. Brazzil, 72 Tex. 233, 10 S. W. 403; English v. Porter, 109 Ill. 285; Crouse v. Holman, 19 Ind. 30; Com. ex rel. Helmbold v. Kirkbride, 11 Phila. (Pa.) 427.

[13] See notes 6, 22, 23.

[14] Com. ex rel. Helmbold v. Kirkbride, 11 Phila. (Pa.) 427.

[15] Milcham v. Montague, 148 Iowa, 476, 125 N. W. 664; Herndon v. Vick, 18 Tex. Civ. App. 583, 45 S. W. 852; Miskey's Appeal, 107 Pa. 611; In re King's Will (Sur.) 172 N. Y. S. 869; De Vries v. Crofoot, 148 Mich. 183, 111 N. W. 775; Weeks v. Reliance Fertilizer Co., 20 Ga. App. 498, 93 S. E. 152; Sheets v. Bray, 125 Ind. 33, 24 N. E. 357; Pennell v. Cummings, 75 Me. 163.

[16] Sommerville v. Greenhood, 65 Mont. 101, 210 P. 1048; Thornton v. Appleton, 29 Me. 298; Clarke v. Sawyer, 3 Sandf. Ch. (N. Y.) 351.

On account of the difficulty of proof and the opportunity for fraud, the presumption of the law is against the occurrence of what is known as "lucid interval"; and where insanity of a permanent nature is once established, the burden will be upon one seeking to take advantage of it to show that an act occurred during a lucid interval.[17] When lucid intervals are shown, it is said that there is no presumption that it will continue for any certain time.[18] Where the existence of the lucid interval is relied on, it must be shown to have existed at the time in question;[19] and, when this is done, it will be presumed that the act in question occurred during the lucid interval.[20] It is also held that, when lucid intervals are shown, such proof serves to destroy the presumption of fixed and continuing insanity, and revives the presumption of sanity.[21] In effect, it serves to shift to the opposite party the burden of showing insanity at the time the act in question was committed.

§ 528. Burden of proof in civil cases

There is little difficulty in determining upon whom the burden of proof rests in civil matters. The fact of insanity, where an issue, must be established as any other issue in the case. Where it is pleaded as a basis for the action, it must be proven as any other material element of the action, aided by the presumptions we have discussed; and, where it is pleaded as a defense, the same rule holds. The rules discussed in the foregoing section are generally applicable to civil actions, except as noted in particular matters such as wills, etc.

[17] Wright v. Wright, 139 Mass. 177, 29 N. E. 380; State v. Lowe, 93 Mo. 547, 5 S. W. 895; Menkins v. Lightner, 18 Ill. 282; Crouse v. Holman, 19 Ind. 30.

[18] Pike v. Pike, 104 Ala. 642, 16 So. 689.

[19] Saxon v. Whitaker's Ex'r, 30 Ala. 237.

[20] Leache v. State, 22 Tex. App. 279, 3 S. W. 545, 58 Am. Rep. 638; Ford v. State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117; U. S. v. Ridgeway, 31 F. 144.

[21] Wright v. Jackson, 59 Wis. 569, 18 N. W. 486; Snow v. Benton, 28 Ill. 306.

The rule with reference to permanent or fixed insanity is fairly uniform; but, where the insanity shown is not fixed or continuous, there is some conflict among the decisions. On the one hand, it is held that, where the transaction sought to be avoided is otherwise fair and equitable on its face, the burden remains with the person seeking to avoid it, throughout a case.[22] On the other hand, it is held by other courts that a showing that a party was insane prior to a transaction in question will shift the burden of proof to the other party to the suit to show that such act was done during a lucid interval.[23] We think that the distinction is more in the use of different expressions than in the rule itself. While the burden of proof as a whole really remains upon the party having the affirmative of the issue, that is, setting up the insanity, yet by a showing of prior insanity such a person makes out a prima facie case, under the rule which presumes insanity, once shown, to continue until the contrary is established; and, when such prima facie case is once made, it devolves upon the opposite party to rebut the same by sufficient proof to overcome the prima facie case so established.

§ 529. Burden of proof on probate

Since it is well established in practically all forums that a man is ordinarily presumed to be sane until the contrary is proven, it would seem to necessarily follow that the maker of a will would be presumed to be sane until that fact is contradicted by competent evidence. This is the rule applied to the execution of deeds, contracts, and formal dispositions of property, and logically should apply to the execution of wills as well;[24] otherwise, you might have the inconsistent condition of a man who executed a will and a deed on the same day being presumed sane as to one act and not sane as to the other. Therefore the

[22] Trimbo v. Trimbo, 47 Minn. 389, 50 N. W. 350; Stewart v. Flint, 59 Vt. 144, 8 A. 801.

[23] Achey v. Stephens, 8 Ind. 411; McNett v. Cooper, 13 F. 586; Herndon v. Vick, 18 Tex. Civ. App. 583, 45 S. W. 852.

[24] Redfield, Wills, p. 32, § 4.

courts of a number of the states have followed the general rule in this respect, and very logically held that the burden of proof, upon the probate of a will, will fall upon the contestant rather than upon the proponent of the will; that is, the onus of proving lack of testamentary capacity will fall on the contestant.[25] While this seems to be the most logical rule, it cannot by any means be said to be the universal rule, and the states of the Union are divided between it and the rule discussed in the succeeding section.

In this connection, it is further held that, if a testator was sane at the time of the making of the will, he will be presumed to have been sane at the time of any alterations made therein;[26] but this will probably not be the rule in those states where the burden of proof is placed upon the proponent of a will.[27]

§ 530. Contra rule

As opposed to the rule placing the onus of proof in the probate of a will upon a contestant, the courts of the greater number of states hold that the burden of proving the mental capacity of a testator rests upon the proponent of a will offered for probate.[28] It is not easy to determine exactly what theory this rule

[25] O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Grabill v. Barr, 5 Pa. 441, 47 Am. Dec. 418; Elkinton v. Brick, 44 N. J. Eq. 154, 15 A. 391, 1 L. R. A. 161; McCulloch v. Campbell, 49 Ark. 367, 5 S. W. 590; Jamison v. Jamison's Will, 3 Houst. (Del.) 108; Stephenson v. Stephenson, 62 Iowa, 163, 17 N. W. 456; Kinloch v. Palmer, 1 Mill, Const. (S. C.) 216; In re Goldthorp's Estate, 115 Iowa, 430, 88 N. W. 944; Mordecai v. Canty, 86 S. C. 470, 68 S. E. 1049; Bey's Succession, 46 La. Ann. 773, 15 So. 297, 24 L. R. A. 577; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666.

[26] Hawkins v. Grimes, 13 B. Mon (Ky.) 257.

[27] Smith v. Henline, 174 Ill. 184, 51 N. E. 227.

[28] Williams v. Robinson, 42 Vt. 658, 1 Am. Rep. 359; Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100; Gerrish v. Nason, 22 Me. 438, 39 Am. Dec. 589; Seebrock v. Fedawa, 30 Neb. 424, 46 N. W. 650; Beazley v. Denson, 40 Tex. 416; Steinkuchler v. Wempner, 169 Ind. 162, 81 N. E. 485, 15 L. R. A. (N. S.) 673; McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682; Layman's

is founded on, as most of the cases follow the rule without going at length into their reasons therefor. It may be gathered, however, that the basis for the rule is the theory that one offering a will for probate necessarily affirms that the testator had testamentary capacity at the time of its execution, as a necessary ingredient of the making of the will; and hence that the testamentary capacity of the maker of the will becomes a part of the proponent's case, and must be proven along with the signing, attesting, etc., of the instrument.

So sharp has been the contention between the supporters of these respective rules that the decisions of a number of states are in conflict among themselves, or have been delivered with strong dissenting opinions.[29] But the decided trend of these decisions has been to place the burden of proof upon the proponent of a will; and the same seems to be true of the later decisions in those states whose courts have heretofore favored the other rule,[30] there being a few exceptions,[31] in some cases founded upon local statutes,[32] and some of the courts seem to hold that, while the burden is upon the proponent to make out a prima

Will, 40 Minn. 371, 42 N. W. 286; Wilbur v. Wilbur, 129 Ill. 392, 21 N. E. 1076; Aikin v. Weckerly, 19 Mich. 482; Sheehan v. Kearney, 82 Miss. 688, 21 So. 41, 35 L. R. A. 106; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1.

[29] Dean v. Dean's Heirs, 27 Vt. 746; Williams v. Robinson, 42 Vt. 658, 1 Am. Rep. 359; Allen v. Griffin, 69 Wis. 529, 35 N. W. 21; Silverthorn's Will, 68 Wis. 372, 32 N. W. 287; Delafield v. Parish, 25 N. Y. 9; Ramsdell v. Viele, 6 Dem. Sur. (N. Y.) 244, affirmed 117 N. Y. 636, 22 N. E. 1130; Brooks v. Barrett, 7 Pick. (Mass.) 94; Phelps v. Hartwell, 1 Mass. 71.

[30] Steinkuehler v. Wempner, 169 Ind. 159, 81 N. E. 484, 15 L. R. A. (N. S.) 673; Hardy v. Merrill, 56 N. H. 233, 22 Am. Rep. 443; Seebrock v. Fedawa, 30 Neb. 435, 46 N. W. 652; In re Small's Will, 118 App. Div. 502, 103 N. Y. S. 705; Oxford v. Oxford, 136 Ga. 589, 71 S. E. 883; McReynolds v. Smith, 172 Ind. 336, 86 N. E. 1009; Teckenbrock v. McLaughlin, 209 Mo. 533, 108 S. W. 46.

[31] In re Loree's Estate, 158 Mich. 372, 122 N. W. 623; In re Durand, 194 N. Y. 477, 87 N. E. 677.

[32] Beazley v. Denson, 40 Tex. 416.

facie case of sanity on the part of the testator, yet the burden then rests upon the contestant upon the whole case to show insanity by a preponderance of the evidence.[33] Also the fact should not be lost sight of that many of the decisions following the second rule—i. e., that which places the burden of proof upon the proponent—are founded upon local statutes, and not on a free choice between the two rules, as an example of which we will note the rule in Texas ante.[34]

§ 531. Degree of proof required

The degree of proof of the proponent of a will varies in the different jurisdictions. It shades off from a requirement of affirmative proof of competency in Georgia and a number of other states[35] to a mere prima facie under the requirements of the Illinois courts.[36]

§ 532. Rule in Texas

The courts of Texas have adopted the second of such rules, requiring proof of the testator's sanity to be made by the proponent of the will. This rule is founded upon the construction of the Texas statute relating to the probate of will in that state which required the proponent to show the mental competency of the testator.[37] The same rule applies to any change which may be made in a will amounting to a codicil.[38]

[33] Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1; In re Murphy's Estate, 43 Mont. 353, 116 P. 1004, Ann. Cas. 1912C, 380.

[34] Ante, § 532.

[35] Evans v. Arnold, 52 Ga. 169; Cilley v. Cilley, 34 Me. 162; Knox's Appeal, 26 Conn. 20.

[36] Thompson v. Bennett, 194 Ill. 57, 62 N. E. 321; Pendlay v. Eaton, 130 Ill. 69, 22 N. E. 853.

[37] Beazley v. Denson, 40 Tex. 416; Rounds v. Coleman (Tex. Civ. App.) 189 S. W. 1087.

[38] Prather v. McClelland (Tex. Civ. App.) 26 S. W. 657.

§ 533. Burden on direct attack on wills

In the case of direct attack made on a will after it has been admitted to probate, a different rule will apply. In such case, the presumption of sanity will prevail, and the burden of proof will be on the contestant of the will. This rule prevails in practically all of the states;[39] Missouri alone not following the rule.[40] This rule, which recognizes the presumption of sanity on the part of the testator, is also applied to cases brought to test land titles depending in whole or in part upon wills.[41] It may even apply in a hearing looking to the probate of a will, where the contest takes the form of a direct attack upon a will, as, for example, where its probate is opposed on grounds that it was procured by undue influence, added to the weak mental condition of the testator, even in those jurisdictions where the burden of proof is ordinarily placed upon the proponent.[42]

Where the insanity of the testator is shown to have existed prior to the making of the will, the presumption of the continuance of that state will prevail, and will operate to throw the burden of proving the sanity of the testator, at the time of the making of such will, upon the proponent;[43] and this will be the effect of a prior adjudication of incompetency.[44] However, for

[39] In re Lavingburg's Estate, 161 Cal. 536, 119 P. 915; Smith v. Day, 2 Pennewill (Del.) 245, 45 A. 396; McMasters v. Blair, 29 Pa. 298; Turner v. Cook, 36 Ind. 129; Rich v. Bowker, 25 Kan. 7; Jenkins v. Tobin, 31 Ark. 306; Shayne v. Shayne, 106 N. Y. S. 34, 54 Misc. Rep. 474; Fowler v. Stagner, 55 Tex. 393.

[40] Jackson v. Hardin, 83 Mo. 175; Berst v. Moxom, 157 Mo. App. 342, 138 S. W. 74.

[41] Den ex dem. Trumbull v. Gibbons, 22 N. J. Law, 117, 51 Am. Dec. 253; Jackson ex dem. Van Dusen v. Van Dusen, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; Thompson v. Kyner, 65 Pa. 368.

[42] Rounds v. Coleman (Tex. Civ. App.) 189 S. W. 1087.

[43] O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. Rep. 322; Grabill v. Barr, 5 Pa. 441, 47 Am. Dec. 418.

[44] Lewis v. Jones, 50 Barb. (N. Y.) 645; Hamilton v. Hamilton, 10 R. I. 538; Stone v. Damon, 12 Mass. 488.

this to be true, such prior insanity must have been something more than a mere temporary mental disorder, or habitual drunkenness.[45] Subsequent insanity will not have such an effect, as it raises no presumption of prior insanity.[46]

§ 534. Burden in criminal cases

In criminal cases, where insanity is pleaded as a defense to the criminal act in question, the burden of proof is essentially different in theory from that in civil cases. The reason for this is the fundamental difference in the rules governing the burden of proof in criminal and civil cases. The decisions in this respect arrange themselves under two heads, or rules, viz.:

First. Since the burden is upon the state to establish every material fact constituting the alleged criminal offense, one essential ingredient of which is a criminal intent on the part of the defendant to commit the crime in question, and since no criminal intent can be established without first showing a rational mind, capable of entertaining such an intent, it is contended in some jurisdictions that the burden necessarily rests upon the state to establish the *sanity* of the accused as a part of its case against him. This theory, which is sometimes known as the American rule, is supported by good reasoning and is followed by the courts of a number of the states of the Union.[47] The statement

[45] McMasters v. Blair, 29 Pa. 298; Blake v. Rourke, 74 Iowa, 519, 38 N. W. 392; Elkinton v. Brick, 44 N. J. Eq. 154, 15 A. 391, 1 L. R. A. 161.

[46] Taylor v. Creswell, 45 Md. 422.

[47] Davis v. U. S., 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499; State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154; People v. McCann, 16 N. Y. 58, 69 Am. Dec. 642, 15 How. Prac. 503; O'Connell v. People, 87 N. Y. 377, 41 Am. Rep. 379; Dove v. State, 3 Heisk. (Tenn.) 348; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; State v. Crawford, 11 Kan. 32; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; Ballard v. State, 19 Neb. 609, 28 N. W. 271; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231; State v. Scott, 49 La. Ann. 253, 21 So. 271, 36 L. R. A. 727, note 2, b, 2; State v. Quigley, 26 R. I. 263, 58 A. 905, 67 L. R. A. 322, 327, 3 Ann. Cas. 920.

of the rule is frequently qualified by the further statement that such burden is ordinarily satisfied by the presumption that men are sane, which will prevail until some evidence is offered which will raise the issue of insanity.

Second. By another group of cases, it is contended that the above rule is not practical in the actual administration of justice, since it places too great a burden upon the state, and calls for proof that is often peculiarly within the control of the defendant. It is therefore held in such jurisdictions that, since all men are presumed to be sane until the contrary is shown, this presumption of sanity will satisfy the necessity for proof of that fact on the part of the state, and that insanity pleaded as a defense is an independent and affirmative fact, which should be established by the party seeking to set it up as a defense. This rule seems to have been first laid down by the English courts in the case of Daniel v. McNaughten,[48] and is frequently spoken of as the English rule.

The last of these rules seems to be the better and more practical of the two; and it is amply supported by the authorities;[49] the Texas courts being especially strong in its enunciation. Its practical effect is to place the burden of proving insanity upon the defendant, who must plead and prove it as a matter of defense; and the state is required to offer proof of sanity only

[48] 10 Clark & F. 200.

[49] Welch v. State, 71 Tex. Cr. R. 17, 157 S. W. 946; State v. Quigley, 26 R. I. 263, 58 A. 905, 67 L. R. A. 323, 3 Ann. Cas. 920; Matheson v. U. S., 33 S. Ct. 355, 227 U. S. 540, 57 L. Ed. 631; Thompson v. Com., 155 Ky. 333, 159 S. W. 829; Rogers v. State, 71 Tex. Cr. R. 149, 159 S. W. 40; State v. Overton, 85 N. J. Law, 287, 88 A. 689; State v. Mewhinney, 43 Utah, 135, 134 P. 632, L. R. A. 1916D, 590, Ann. Cas. 1916C, 537; Ford v. State, 71 Ala. 385; Lynch v. Com., 77 Pa. 205; State v. Redemeier, 71 Mo. 173, 36 Am. Rep. 462; Cavaness v. State, 43 Ark. 331; State v. Lawrence, 57 Me. 574; Com. v. Eddy, 7 Gray (Mass.) 583; Dejarnette v. Com., 75 Va. 867; Coyle v. Com., 100 Pa. 573, 45 Am. Rep. 397; State v. Hancock, 151 N. C. 699, 66 S. E. 137; State v. Jones, 64 Iowa, 349, 17 N. W. 911, 20 N. W. 470.

after the issue has been fairly raised by the evidence offered by the defense. In this connection, it is held that, where insanity is shown to have existed in a fixed or permanent form prior to the criminal act, it will be presumed to have continued up to the time of such act, and this will throw the burden on the state of showing that the defendant was sane at the time the criminal act was committed;[50] and this is especially true where such insanity has been established by a proceeding of de lunatico inquirendo,[51] etc. But this is only prima facie, or presumptive, evidence of insanity at the time such crime was committed, and may be rebutted by the state.[52] Moreover, the rule only applies to fixed or permanent insanity, and, where the defendant is shown to have lucid intervals, it will be presumed that the criminal act was committed during one of such lucid intervals,[53] and the burden of showing insanity will be thrown upon the defendant.

§ 535. Degree of proof required

As in the requirement for burden of proof, the degree of proof of insanity required in a civil case is the same as that required as to any material fact going to make out the cause of action or grounds of defense; that is, it must be proven by preponderance of the evidence.[54] This rule is fairly well settled, and there is little conflict among the decisions.

This is not true in criminal law, where there is much conflict of authority. Also, the use of different expressions by the court

[50] Wheeler v. State, 34 Ohio St. 396, 32 Am. Rep. 372; In re Brown, 39 Wash. 160, 81 P. 552, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868, 4 Ann. Cas. 492; Armstrong v. State, 30 Fla. 170, 11 So. 618, 17 L. R. A. 484; People v. Francis, 38 Cal. 183; State v. Johnson, 40 Conn. 136; Langdon v. People, 133 Ill. 382, 24 N. E. 874.

[51] Witty v. State, 69 Tex. Cr. R. 125, 153 S. W. 1147.

[52] Witty v. State, 69 Tex. Cr. R. 125, 153 S. W. 1146; Wheeler v. State, 34 Ohio St. 396, 32 Am. Rep. 372.

[53] Leache v. State, 22 Tex. App. 316, 3 S. W. 539, 58 Am. Rep. 638.

[54] Missouri Pac. Ry. Co. v. Brazzil, 72 Tex. 233, 10 S. W. 403; Wall v. Hill's Heirs, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578; Boswell v. State, 63 Ala. 326, 35 Am. Rep. 20.

in describing the required degree of proof has led to more or less confusion. Usually, however, the cases fall in one of four groups, viz.:

Under the authority of the first of these groups of cases, the jury is required to be satisfied beyond a reasonable doubt of the sanity of the accused before a conviction can be had. This rule is based primarily upon the idea that a criminal intent is an essential ingredient of crime, and must be established to the same certainty as the overt act itself, and that to show a criminal intent it is necessary to show a mind capable of entertaining such an intent; i. e., a sane mind, capable of knowing right from wrong. The United States courts and the courts of the states of New York, Mississippi, Nebraska, New Hampshire, Illinois, Indiana, Kansas, Florida, Michigan, Connecticut, Oregon, and New Mexico seem to favor this rule.[55] This seems to have formerly been the rule in Louisiana,[56] but has apparently been changed by later decisions.[57] In a few cases the same degree of proof is required, even when the burden devolved upon the defendant to establish insanity;[58] but it is difficult to see just what

[55] Territory v. McNabb, 16 N. M. 625, 120 P. 907; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231; Davis v. U. S., 160 U. S. 469, 16 S. Ct. 353, 40 L. Ed. 499; State v. Jones, 50 N. H. 369, 9 Am. Rep. 242; King v. State, 91 Tenn. 617, 20 S. W. 169; Armstrong v. State, 30 Fla. 170, 11 So. 618, 17 L. R. A. 484; Russell v. State, 53 Miss. 367; State v. Crawford, 11 Kan. 32; Cunningham v. State, 56 Miss. 269, 31 Am. Rep. 360; O'Connell v. People, 87 N. Y. 377, 41 Am. Rep. 379; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Walker v. People, 88 N. Y. 87; People v. Finley, 38 Mich. 482; Stevens v. State, 31 Ind. 486, 99 Am. Dec. 634; State v. Johnson, 40 Conn. 136; Ballard v. State, 19 Neb. 609, 28 N. W. 271; State v. Hansen, 25 Or. 391, 35 P. 976, 36 P. 296.

[56] State v. Coleman, 27 La. Ann. 691; State v. Clements, 47 La. Ann. 1088, 17 So. 502; State v. De Rancé, 34 La. Ann. 186, 44 Am. Rep. 426.

[57] State v. Scott, 49 La. Ann. 253, 21 So. 271, 36 L. R. A. 721.

[58] State v. Hansen, 25 Or. 391, 35 P. 976, 36 P. 296; State v. Clements, 47 La. Ann. 1088, 17 So. 502; State v. Spencer, 21 N. J. Law, 196; State v. Brinyea, 5 Ala. 241; Ortwein v. Com., 76 Pa. 414, 18 Am. Rep. 420; State v. Coleman, 20 S. C. 441.

theory these cases are based on, as the presumption of sanity, where it is recognized, is only prima facie proof of that fact, and the defendant could hardly be required to prove his own innocence beyond a reasonable doubt.

§ 536. Contra rule

As opposed to the rule we have discussed in the foregoing section is that followed by the courts of a number of other states to the effect that the degree of proof required in a criminal case should be the same as that required in a civil case; i. e., the insanity of the accused need only be proven by a preponderance of evidence. This rule is usually found in those states where the onus of proving insanity, or rather of approving sanity, is placed on the defendant. It is contended in support of this rule that the requirement that the fact of sanity vel non be established beyond a reasonable doubt would not apply, because that fact is no longer a part of the state's case, but is now considered to be a fact to be established by the defendant in avoidance of the state's case; and, this being true, there is no rule of law which would require a greater degree of proof than that ordinarily required to establish any other fact—i. e., a fair preponderance of the evidence, which, in itself, would be sufficient to overcome the presumption of sanity. This rule seems to be favored by the courts of Arkansas, California, Georgia, Idaho, Kentucky, Iowa, Nevada, Ohio, Pennsylvania, South Carolina, and Utah.[59]

In this connection the term *preponderance of the evidence* is

[59] People v. McNulty, 93 Cal. 427, 26 P. 597, 29 P. 61; Carr v. State, 96 Ga. 284, 22 S. E. 570; State v. Trout, 74 Iowa, 545, 38 N. W. 405, 7 Am. St. Rep. 499; State v. Larkins, 5 Idaho, 200, 47 P. 945; Moore v. Com., 92 Ky. 630, 18 S. W. 833; Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Williams v. State, 50 Ark. 517, 9 S. W. 5; People v. Dillon, 8 Utah, 92, 30 P. 150; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; Bergin v. State, 31 Ohio St. 111; Coyle v. Com., 100 Pa. 573, 45 Am. Rep. 397; State v. Lewis, 20 Nev. 333, 22 P. 241; Smith v. State, 182 Ala. 38, 62 So. 184; People v. Ashland, 20 Cal. App. 168, 128 P. 798.

used in the ordinary sense of that term. It does not necessarily mean the greater number of witnesses, but it must show such a preponderance of facts and circumstances as will outweigh the mere presumption that all men are ordinarily sane.[60] Where the evidence, taken all together, does not show this, the insanity is not established.[61]

§ 537. General rule

The rule with reference to the degree of insanity announced by the third group of cases is rather a compromise between the rules considered in the foregoing sections. In a number of the states, where the burden of proving insanity in a criminal case is placed upon the defendant, the courts have refused to take the position that the defendant in a criminal case should be required to prove his own insanity, or disprove his sanity, beyond a reasonable doubt; yet they are, apparently, not willing to allow the well-recognized presumption of sanity to be overcome by so small an amount of proof as a bare preponderance of evidence. They have therefore sought a half-way ground. In doing this some confusion has been caused by the use of loose and dissimilar expressions, such as "clearly proven," [62] "a fair preponderance of the evidence," [63] "to the satisfaction of the jury," [64] "proven to a reasonable certainty," [65] "clearly by a preponderance of the evidence," [66] and similar expressions. Taking the cases, however, as a whole, their intent seems to be that the insanity is required to be clearly and satisfactorily shown; that is to say, such an amount of evidence must be introduced as will reasonably impress the ordinary mind with the truth of the plea of insanity

[60] Meyers v. Com., 83 Pa. 141; People v. Barberi (Sup.) 47 N. Y. S. 168; Moore v. Com., 92 Ky. 630, 18 S. W. 833.

[61] Wall v. Hill's Heirs, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578.

[62] Giebel v. State, 28 Tex. App. 151, 12 S. W. 591.

[63] Coyle v. Com., 100 Pa. 573, 45 Am. Rep. 397.

[64] Hurst v. State, 40 Tex. Cr. R. 378, 46 S. W. 635, 50 S. W. 719.

[65] Beck v. State, 76 Ga. 452.

[66] McCullough v. State, 50 Tex. Cr. R. 132, 94 S. W. 1056.

and lead it to give credence to such fact. The rule is very lucidly stated by the California court,[67] quoted with approval by the Texas Court of Appeals,[68] in the following paragraph:

"In the connection in which the words are used, to say that the insanity must be clearly established is not to say that the evidence must more than preponderate, but only that the preponderance must be plainly apparent. Such must be the case in every instance where the affirmance of an issue is sought to be established and a peculiar presumption overcome. There may be a greater or less degree of lucidity, but the preponderance must be distinctly perceptible. In civil cases, fraud is proven by a preponderance of the evidence, yet, inasmuch as the law, to the credit of humanity, presumes that men are oftener honest than dishonest, that preponderance must clearly appear. Thus only can the fact of fraud or insanity be satisfactorily proven."

This rule seems to be supported by the soundest argument and to be the most practicable. It is apparently favored by the English courts and by those of the states of Delaware, Maine, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Alabama, Virginia, West Virginia, and Texas.[69]

[67] People v. Hamilton, 62 Cal. 377.

[68] Giebel v. State, 28 Tex. App. 151, 12 S. W. 591.

[69] Paikn's Case, 1 Callinson, Lunacy, 477; Humphreys v. State, 45 Ga. 190; People v. McDonell, 47 Cal. 134; State v. Scott, 8 N. C. (1 Hawks) 24; State v. Smith, 53 Mo. 267; State v. Palmer, 161 Mo. 152, 61 S. W. 651; State v. Spivey, 132 N. C. 989, 43 S. E. 475; State v. Crowe, 39 Mont. 174, 102 P. 579, 18 Ann. Cas. 643; State v. Cole, 2 Pennewill (Del.) 344, 45 A. 391; Com. v. Eddy, 73 Mass. (7 Gray) 583, 19 Law Rep. 611; Rayfield v. State, 167 Ala. 94, 52 So. 833; State v. Porter, 213 Mo. 43, 111 S. W. 529, 127 Am. St. Rep. 589; State v. Martin, 3 Cr. Law Mag. 44; Webb v. State, 9 Tex. App. 495; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799; State v. Hanley, 34 Minn. 430, 26 N. W. 397; Dejarnette v. Com., 75 Va. 867; Baccigalupo v. Com., 33 Grat. (Va.) 807, 36 Am. Rep. 795; State v. Lawrence, 57 Me. 574.

§ 538. Rule in Texas

The courts of Texas are inclined to follow the third rule—i. e., the rule discussed in the foregoing paragraphs—and which required the insanity to be proven by a clear preponderance of the evidence in much the same way as fraud is required to be shown. There are a number of authorities which would seem to indicate that a mere preponderance of the evidence is all that is required,[70] but we think that a close analysis of the majority of the decisions of the subject will show that these are mere loose expressions of the requirements, and that the general rule is as we have indicated.[71] But the mere fact that insanity must be proven, or proven to the satisfaction of the jury, does not mean that it must be proven beyond a reasonable doubt, and the jury should be so instructed.[72] However, it is held that this last requirement is satisfied by the general clause in the charge to the effect that the state must prove the defendant guilty beyond a reasonable doubt.[73]

§ 539. Modification of general rule

The third rule we have discussed above is changed by the courts of some of the states to this extent. The presumption that all men are ordinarily sane is allowed to excuse the necessity of the part of the state of offering evidence of sanity, so long as it stands unquestioned; but, when the presumption is rebutted by any evidence the defendant may offer, fairly raising a reasonable doubt of the defendant's sanity, the duty evolves

[70] Fults v. State, 50 Tex. Cr. R. 502, 98 S. W. 1057; article 40, White's Ann. Pen. Code, notes.

[71] Hurst v. State, 40 Tex. Cr. R. 387, 46 S. W. 635, 50 S. W. 719; Webb v. State, 9 Tex. App. 490; King v. State, 9 Tex. App. 515; Leache v. State, 22 Tex. App. 308, 3 S. W. 541, 58 Am. Rep. 641; Lovegrove v. State, 31 Tex. Cr. R. 492, 21 S. W. 191.

[72] King v. State, 9 Tex. App. 515; Webb v. State, 9 Tex. App. 490; Hurst v. State, 40 Tex. Cr. R. 378, 46 S. W. 635, 50 S. W. 719.

[73] See note 72, supra.

upon the state to establish the sanity of such defendant as any other material fact in the state's case.[74] The idea seems to be that the burden rests upon the state to prove sanity as a part of its case, and that this requirement is satisfied by the recognized presumption that all men are sane so long as the matter remains unquestioned, but that, when that presumption is overturned by evidence on the part of the defendant, the burden reverts to the state to prove the defendant's sanity. Some later cases seem to favor this view,[75] and others deny it.[76]

§ 540. Application of rules

The practical result, we think, of the last two rules, is reflected in the rule which has grown up in a number of the states which recognize that the defense of insanity is established, if all the evidence, offered both by the state and defendant, leaves in the mind of the jury a reasonable doubt of the defendant's sanity.[77] On a careful analysis it will be seen that this rule places the burden of raising the issue of insanity first upon the defendant, and then requires the state to establish the defendant's sanity beyond a reasonable doubt. This, we think, is the general rule in criminal cases, where the issue of insanity has been raised.

[74] Adair v. State, 6 Okl. Cr. 284, 118 P. 416, 44 L. R. A. (N. S.) 119; Pribble v. People, 49 Colo. 210, 112 P. 220; State v. Brown, 36 Utah, 46, 102 P. 641, 24 L. R. A. (N. S.) 545; Ford v. State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117.

[75] Adair v. State, 6 Okl. Cr. 284, 118 P. 416, 44 L. R. A. (N. S.) 119.

[76] State v. Craig, 52 Wash. 66, 100 P. 167.

[77] Montag v. People, 141 Ill. 75, 30 N. E. 337; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; Brown v. State, 40 Fla. 459, 25 So. 63; State v. Nixon, 32 Kan. 205, 4 P. 159; State v. Marler, 2 Ala. 43, 36 Am. Dec. 398; Smith v. Com., 1 Duv. (Ky.) 224; Ford v. State, 73 Miss. 734, 19 So. 665, 35 L. R. A. 117; People v. Taylor, 138 N. Y. 398, 34 N. E. 275; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Com. v. Gilbert, 165 Mass. 45, 42 N. E. 336; State v. Peel, 23 Mont. 358, 59 P. 169, 75 Am. St. Rep. 529; State v. Coleman, 20 S. C. 441; Knights v. State, 58 Neb. 225, 78 N. W. 508, 76 Am. St. Rep. 78; Revoir v. State, 82 Wis. 295, 52 N. W. 84; State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154.

§ 541. Burden of proof on inquisition

There is very little direct judicial precedent on which to base a rule with respect to the burden of proof on inquisition of insanity. A board, commission, or court, sitting as an inquisitional body only, partakes more of the nature of an inquisitional agency than of a judicial tribunal; i. e., its function is more to actively inquire into a mental condition than to set a passive agency to hear evidence and to determine its weight. Frequently the board or committee making the inquiry is composed of physicians, alienists, and other persons of scientific training, who make up their minds more from an examination and observation of the alleged non compos than from what would be strictly termed evidence.

It may therefore be said that there is, strictly speaking, no rule with reference to the burden or of proof in such inquiries, except that the board, committee, etc., must make its decision from all the knowledge it may acquire, without reference to who furnishes it, and that its collective mind must be sufficiently impressed as to lead it to pronounce a decision with reference to the sanity or insanity of the subject of the inquiry.

§ 542. Degree of proof required

Because an adjudication of insanity may deprive one of valuable rights, including liberty itself, it is said that the proof offered in an inquiry looking to the adjudication of one said to be insane must show his insanity beyond a reasonable doubt.[78] While this degree of proof is not always required, the cases generally require that the proof be such as will satisfy a court reviewing the case that the person is actually insane.

[78] Schutte v. Schutte, 86 W. Va. 701, 104 S. E. 108, 19 A. L. R. 711; Commonwealth ex rel. Helmbold v. Kirkbride, 11 Phila. (Pa.) 427.

§ 543. Means of proof, in general

Evidence in insanity cases is, of necessity, allowed to take a wide range. This wide latitude is made necessary by the nature of the subject. Insanity is a mental condition, not a thing which can be observed by direct contact through the ordinary senses, and its existence can only be ascertained and its extent measured through the acts, conduct, and appearance of the person affected. Any act or circumstance, therefore, which will reasonably serve to this end will be competent, and things, conduct, and circumstances, which are ordinarily rejected as too remote or circumstantial, are admitted for what they are worth. But, while this is true in general, it will not be extended beyond what is actually necessary. For example, the state of the mind as reflected in acts and appearance of the purported insane person must be proven by direct evidence of such acts, etc., and cannot be proven from general reputation or rumor that such person is insane,[79] or by hearsay even on the part of the members of the family of the non compos.[80] The rule which forbids the admission of evidence of insanity based on rumor or general reputation applies equally to the reputation of such person in his own family and in the community;[81] nor can it be shown by proof of family conduct.[82] In addition to direct evidence of the conduct and appearance of the non compos tending to show his mental condition, opinions of those who either from close association or observation of the non compos or because of special study of the mental phenomena, have acquired unusual knowl-

[79] Ellis v. State, 33 Tex. Cr. R. 86, 24 S. W. 894; Cotrell v. Com., 13 Ky. Law Rep. 305, 17 S. W. 149; First Nat. Bank of Navasota v. McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495; Foster v. Brooks, 6 Ga. 292; Ashcraft v. De Armond, 44 Iowa, 229.

[80] People v. Koerner, 154 N. Y. 355, 373, 48 N. E. 730.

[81] Walker v. State, 102 Ind. 502, 1 N. E. 856; State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89; State v. Coley, 114 N. C. 879, 19 S. E. 705; Choice v. State, 31 Ga. 424; Snell v. U. S., 16 App. D. C. 501.

[82] People v. Pico, 62 Cal. 50.

edge of his mental condition, are competent as evidence to aid the court in interpreting the evidence before it, and the rule of law relating to the introduction of such opinion evidence, forms one of the most complex branches of the adjective law.

§ 544. Appearance as evidence

It is a well-known fact that the condition and character of the mind finds reflection in physical characteristics. Not only are temporary emotions, joy, grief, anger, etc., easily recognized from the expressions they call forth, but the continuance of such emotion may leave a permanent impression on the features and limbs. A "sunny" face is always associated with a happy state of mind, while a "sour" expression is taken to denote an unhappy and discontented mind. That this is true of mental defectives a visit to any institution for the care of these unfortunates will show. The imbecility of the patient is most frequently indicated by the "vacant" expression, denoting only too clearly the vacant mind and the "sagging" jaw, the awkward drooping of the hands, or the twisting inward of the feet indicate the lessening of the rational control of the mind over the body. It is therefore well settled that the physical appearance of the alleged non compos, his expression and mannerisms are competent, as evidence of his sanity or insanity.[83] This is usually placed in evidence by calling the non compos to the stand as a witness where he can be observed by the court and his appearance, etc., taken into account,[84] and to that end such alleged insane person may even be attached and brought into court as a witness.[85] But it would seem that it may not necessarily be confined to his conduct while on the stand, but the whole of his conduct during the trial

[83] Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1002, 43 S. W. 344, 39 L. R. A. 305, 330; Com. v. Buccieri, 153 Pa. St. 535, 26 A. 228; State v. Wright, 112 Iowa, 436, 84 N. W. 541.

[84] Holland v. Riggs, 53 Tex. Civ. App. 367, 116 S. W. 173, writ of error denied.

[85] Holland v. Riggs, 53 Tex. Civ. App. 367, 116 S. W. 167, writ of error denied.

may be taken into consideration.[86] This may be contradicted by testimony to the effect that the non compos is not acting naturally and that he is playing a part.[87]

§ 545. Bodily health as evidence

It is now a very well-recognized fact that the physical condition of the body has considerable influence over the condition of the mind. A healthy body usually tends to a clear and normal mind, while a weak and diseased wrecked body tends to depress and weaken the mind. It has been affirmatively held that the state of one's health may be considered in determining the mental capacity.[88] This is especially true where the bodily ailments tend to affect the nervous system. It is therefore competent to show any physical ailment or condition which would tend to extend its effect to the mental conditions. For example, it has been held competent to show that the alleged insane person has been subject to epileptic fits,[89] although it is not in itself a form of insanity;[90] but the fact that it is a nervous disorder which may reach and affect the brain is sufficient to authorize its introduction in evidence as a circumstance tending to show conditions favorable to the existence of mental disorder. For the same reason, insomnia and nervousness may be shown.[91] So the abuse of the body and health may be shown, where such abuse will ordinarily tend to extend its ultimate effect to the mind. For example, it is frequently competent to show masturbation on the part of the alleged non compos because it is well-recognized that

[86] Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1002, 43 S. W. 344, 39 L. R. A. 305, 330.

[87] Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1002, 43 S. W. 344, 39 L. R. A. 305, 330.

[88] Johnson v. Gulf, C. & S. F. Ry. Co., 36 Tex. Civ. App. 487, 81 S. W. 1197; Bradshaw v. Brown (Tex. Civ. App.) 218 S. W. 1075.

[89] State v. Wright, 112 Iowa, 436, 84 N. W. 541; Com. v. Winnemore, 1 Brewst. (Pa.) 356.

[90] See § 52, supra.

[91] Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20.

this form of abuse will tend to superinduce certain forms of insanity.[92] In like manner, drunkenness, especially if excessive and habitual, and use of drugs, may be shown where the form of insanity claimed could be induced or exaggerated by either of these agencies.[93] But it is not ordinarily competent to show great depravity or licentious conduct and excesses, as this only tends to produce a lessening of the moral faculties,[94] and no degree of moral weakness is excuse for crime as partakes of the nature of the so-called "moral insanity." [95] It might become competent, however, as tending to show a course of action wholly at variance to that before the alleged derangement.[96]

§ 546. Acts and conduct as evidence

As the acts and conduct of a person are but expression of ideas first finding birth in the mind, it follows that such acts are direct manifestations of the ideas themselves and the best evidence we have of what the ideas are. As it has been aptly expressed, the act is the child of the thought; and as evidence of the condition of the mind which gives them birth, they rank as the best evidence so long as they are actually expressions of its true condition. But, unfortunately, honesty of expression is a more or less difficult matter to determine. The instances where the designing have feigned insanity by their acts are numerous, and this adds to the difficulty of determining a condition as intangible as that of the mind.

92 See supra, § 120.
93 See supra, § 119.
94 Hill v. Hill, 27 N. J. Eq. 214.
95 See § 73, supra.
96 See ante, § 547.

§ 547. Limitation to the rule

It is fairly well settled that the acts of a person alleged to be insane may be shown as bearing on his mental state and considerable latitude will be given in making the proof.[97] Acts done since the occurrence may be shown to prove a change of acts and conduct, since he is alleged to have become insane, and even his actions and conduct while confined in jail may be shown;[98] but this last has been denied, where such acts are of an incriminating character in connection with the act for which he is being tried, since in such case he must have been first warned, because otherwise he would be made to testify against himself without being given the required warning.[99] In addition, such acts may be used as the basis of opinions, expert and nonexpert, bearing on the person's sanity, as will be seen in another section.[1] Manifestly, the alleged insanity may be contradicted by proving acts inconsistent with such a theory.[2] In this connection, it has been held that, where they are unusual and purposeless, they may be shown as a corroborating circumstance, though they may not themselves be evidence of insanity. For example, atrociousness of a criminal act and lack of reasonable grounds for its commission may be shown as contributing evidence of one's mental derangement at the time of the commission of such crime.[3]

97 Barber's Appeal, 63 Conn. 393, 27 A. 973, 22 L. R. A. 90; In re Mullin's Estate, 110 Cal. 252, 42 P. 645; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070, 1 A. L. R. 1514.

98 Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; State v. Wright, 112 Iowa, 436, 84 N. W. 541.

99 Barth v. State, 39 Tex. Cr. R. 381, 46 S. W. 230, 73 Am. St. Rep. 935.

1 See ante, §§ 573, 597.

2 Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1000, 39 L. R. A. 305, 330.

3 State v. Coleman, 20 S. C. 441; United States v. Lee, 4 Mackey (15 D. C.) 489, 54 Am. Rep. 293.

§ 548. Speech as evidence

Speech, as well as acts, may be offered in evidence to indicate one's mental state.[4] It is well-recognized that the mental condition is usually reflected in the speech. Not only are the ideas expressed disjointed, confused, and without logical sequence in extreme cases, but the manner of speech is often indicative in itself. Where it is very apparent, the alleged insane person may be called to the stand and examined before the jury, or testimony of other witness may be offered, and it will not be objectionable as hearsay, since it is not the facts communicated by the speech, but the speech itself, that is the subject of such testimony.[5] However, the speech so proved must not be of an incriminating nature in connection with the case then on trial, as it will then be in the nature of a confession,[6] and subject to the requirement of previous warning to the defendant.[7] Where offered on behalf of a defendant himself, they are not objectionable as self-serving declarations,[8] for the same reason that they are not objectionable as hearsay; i. e., their purpose is to show

[4] Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070, 1 A. L. R. 1514; Lane v. Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; Rambler v. Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444; Wilkinson v. Service, 249 Ill. 146, 94 N. E. 50, Ann. Cas. 1912A, 41; State v. Wright, 112 Iowa, 436, 84 N. W. 541; Davis v. Calvert, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; State v. Cooper, 170 N. C. 719, 87 S. E. 50, 8 A. L. R. 1214; In re Carson's Estate, 184 Cal. 437, 194 P. 5, 17 A. L. R. 245; McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280.

[5] Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100; Wilkinson v. Service, 249 Ill. 146, 94 N. E. 50, Ann. Cas. 1912A, 41; Lane v. Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430.

[6] See ante, § 550.

[7] Barth v. State, 39 Tex. Cr. R. 381, 46 S. W. 230, 73 Am. St. Rep. 935.

[8] State v. Porter, 213 Mo. 43, 111 S. W. 529, 127 Am. St. Rep. 589; State v. Driggers, 84 S. C. 526, 66 S. E. 1042, 137 Am. St. Rep. 855, 19 Ann. Cas. 1166.

the condition of the mind, and not to establish the truth of the statement.

In a few instances, the statements of third persons may be offered in evidence on the question of one's sanity. Statements made in the presence of the alleged non compos and without protest on his part have been admitted to show insanity. For example, it has been held that such statements to the effect that he did not attend to business and was incapable could be shown,[9] as it is usual for a sane person to deny or protest against such statements. Also, the declaration of a legatee tending to show the insanity of the testator may be shown as a declaration against interest;[10] but this would not be true, where there were other legatees whose interest would be affected by such declaration.[11] The declarations of the guardians or other representatives of a non compos cannot be offered in evidence against him, unless authorized by statute.[12] Nor can a guardian ad litem bind a non compos ward by any admission made during trial with reference to a fact necessary to sustain a recovery against the ward.[13]

§ 549. Writings as evidence

Not only may the verbal utterances of an alleged non compos person be offered as evidence, as tending to show his mental condition, but his written utterances may be so offered.[14] It is evident that written expressions, especially if made before the question of insanity has been raised, are likely to be a more accurate indication of mental state than spoken words which may be spoken for a purpose. It therefore follows that the letters,

[9] Titlow v. Titlow, 54 Pa. 216, 93 Am. Dec. 691.

[10] Davis v. Calvert, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282, note.

[11] In re Myer's Will, 184 N. Y. 54, 76 N. E. 920, 6 Ann. Cas. 26; In re Dolbeer's Estate, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795.

[12] Kromer v. Friday, 10 Wash. 621, 39 P. 229, 32 L. R. A. 688.

[13] Gersdorff v. Torres (Tex. Com. App.) 293 S. W. 561; White v. Joyce, 158 U. S. 128, 15 S. Ct. 788, 39 L. Ed. 921.

[14] Blume v. State, 154 Ind. 343, 56 N. E. 771; Sayres v. Com., 88 Pa. 291; State v. Speyer, 194 Mo. 459, 91 S. W. 1075.

diaries, and other writings of the alleged non compos are admissible in evidence as bearing on his sanity, where such writings are identified as the act of the alleged insane person, and are shown to have been written during the period likely to have been covered by the person's insanity.[15] Such writings are not admissible as evidence of the truth of what they contain, but merely as showing the thoughts of the non compos which might tend to throw light on his mental condition. In this connection, it has been held that the writings themselves are the best evidence, and that they cannot be shown by secondary evidence without first showing loss or destruction of the document, or otherwise satisfactorily accounting for its nonproduction.[16]

§ 550. Confessions as evidence

As suggested supra,[17] an exception to the introduction in evidence of an insane person's acts and speech is found where such expression or admission of the non compos amounts to what is in reality a confession. The reason is obvious. It is fundamental that one cannot be forced to make an involuntary confession, and one who is without mental capacity to realize and appreciate the nature and effect of such a confession can hardly be said to act voluntarily. There is, therefore, authority for the rule that, where a defendant is so mentally defective that he has not the capacity to understand and appreciate the nature and effect of a confession made by him, it will not be admissible in evidence against him.[18] But, while this is theoretically true, its practical application is not clear, and will likely apply only to cases where a total lack of mind is apparent. From a practical

[15] Barber's Appeal, 63 Conn. 393, 27 A. 973, 22 L. R. A. 98; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1; Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100.

[16] Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1.

[17] Supra, § 547.

[18] Grayson v. State, 40 Tex. Cr. R. 573, 51 S. W. 246; State v. Berberick, 38 Mont. 423, 100 P. 209, 16 Ann. Cas. 1077; State v. Hill, 65 N. J. Law, 626, 47 A. 814.

standpoint, mental weakness merely goes to the weight of the confession, and requires that it be admitted with caution,[19] and does not of itself render it inadmissible.[20] The same is true of excitement which may render the mind temporarily incapable of cool reflection.[21] But where the mental weakness is coupled with circumstances calculated to inspire fear, a confession taken under these joint influences has been rejected.[22] The reason is likely that it was secured under duress made possible by the defendant's mental weakness.

§ 551. Rule applied to intoxicated and drug addict

For much the same reason, a confession taken at a time when the defendant is under the influence of drugs,[23] or is so intoxicated,[24] that he does not know what he is doing, should not be received because it is not voluntarily made; but mere intoxication short of such a state will only go to the weight of the confession, and not to its admissibility, some authorities contending

[19] State v. Summons, 1 Ohio Dec. (Reprint) 416, 9 West. Law J. 407; Williams v. State, 69 Ark. 599, 65 S. W. 103; People v. Miller, 135 Cal. 69, 67 P. 12; State v. Berberick, 38 Mont. 423, 100 P. 209, 16 Ann. Cas. 1077.

[20] State v. Phelps, 138 La. 11, 69 So. 856; People v. Kent, 41 Misc. Rep. 191, 83 N. Y. S. 948; People v. Miller, 135 Cal. 69, 67 P. 12; Shellenberger v. State, 97 Neb. 498, 150 N. W. 643, L. R. A. 1915C, 1163; People v. Miller, 135 Cal. 69, 67 P. 12; State v. Berberick, 38 Mont. 423, 100 P. 209, 16 Ann. Cas. 1077; 18 L. R. A. (N. S.) 789, note.

[21] Carlisle v. State, 37 Tex. Cr. R. 108, 38 S. W. 991; People v. Cokahnour, 120 Cal. 253, 52 P. 505; State v. Pamelia, 122 La. 207, 47 So. 508.

[22] Flagg v. People, 40 Mich. 706; Williams v. State, 69 Ark. 599, 65 S. W. 103; Watts v. State, 99 Md. 30, 57 A. 542.

[23] State v. Sirmay, 40 Utah, 525, 122 P. 748; People v. Kent, 41 Misc. Rep. 191, 83 N. Y. S. 948.

[24] Com. v. Howe, 9 Gray (Mass.) 110; Lienpo v. State, 28 Tex. App. 179, 12 S. W. 588; Leach v. State, 99 Tenn. 584, 42 S. W. 195; State v. Hopkirk, 84 Mo. 278; White v. State, 32 Tex. Cr. R. 625, 25 S. W. 784; State v. Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296; State v. Hogan, 117 La. 863, 42 So. 352.

that the degree of intoxication itself is for the jury.[25] In some jurisdictions it is held that intoxication must amount to a mania before it will be grounds for excluding a confession.[26] There is the further objection that a statement made by one under the influence of drugs or liquor is not likely to be accurate, but such an objection will likely go to the weight, rather than to the admission of the same, and requires that a confession made under such circumstances be received with caution.[27] The mere fact that a person was drinking, or even intoxicated to some extent, at the time a confession is made will not necessarily render the confession inadmissible in evidence, even where the intoxicants are furnished by the party securing the confession; such matters going to the weight to be given the confession.[28] In a few of the states, confessions secured while the defendant is under the influence of intoxicants supplied by or with the knowledge of the office securing it will not be received in evidence.[29] But the majority admit them as above indicated.

§ 552. Passions and emotions as evidence

Closely related to the actions and speech in expressing the mental state of a person are the passions and emotions. While they may, and frequently are, expressed by the medium of action and speech, yet they may find expression through other means as well, e. g., the expression of the face, the appearance of the eye, the disarrangement of the apparel, the twitching or jerk-

[25] White v. State, 32 Tex. Cr. R. 625, 25 S. W. 784; State v. Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296; State v. Hogan, 117 La. 863, 42 So. 352.

[26] Lindsey v. State, 66 Fla. 341, 63 So. 832, 50 L. R. A. (N. S.) 1077, Ann. Cas. 1916C, 1167; State v. Hogan, 117 La. 863, 42 So. 352.

[27] State v. Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296; People v. Fox, 121 N. Y. 449, 24 N. E. 923; White v. State, 32 Tex. Cr. R. 625, 25 S. W. 784; State v. Hogan, 117 La. 863, 42 So. 352.

[28] Lindsey v. State, 66 Fla. 341, 63 So. 832, 50 L. R. A. (N. S.) 1077, Ann. Cas. 1916C, 1167; Lienpo v. State, 28 Tex. App. 179, 12 S. W. 588.

[29] McCabe v. Com. (Pa.) 8 A. 45.

ing of the body, incoherence of speech, etc., all of which may point irrefutably to an inflamed condition of the mind and unbridled passion growing out of the same. Or, on the other hand, dullness of the eyes, depression of the features, neglected condition of the clothing and person, may indicate mental depression and melancholy. It is therefore the general rule that evidence of passions and emotions are admissible as indicative of the mental state at the time of the existence of such feelings.[30] This may be proven by the exhibition of the person of the alleged non compos during the trial, or by the testimony of witness who witnessed the manifestations of passion and emotion on the part of the alleged insane person.[31] As opposed to such testimony, evidence may be offered tending to show a lack of strong emotion on the part of the alleged non compos, his calmness of mind and coolness of action.[32] Insomnia, or inability to sleep,[33] and somnambulism, or walking and moving about in the sleep,[34] may be shown as tending to indicate a disturbed and unsettled mental condition.

§ 553. By showing predisposition towards insanity

As tending to show the mental condition of an alleged insane person, evidence may be offered of his predisposition to insanity. This may be done, either by showing the previous state of the person's mind, or it may be shown by offering evidence of the insanity of such person's ancestors, since the courts take judicial notice that insanity is hereditary.[35]

30 Green v. State, 64 Ark. 523, 43 S. W. 973; State v. Cooper, 170 N. C. 719, 87 S. E. 50, 8 A. L. R. 1214.

31 Green v. State, 64 Ark. 523, 43 S. W. 973.

32 Green v. State, 64 Ark. 523, 43 S. W. 973; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231.

33 Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20.

34 Fain v. Com., 78 Ky. 183, 39 Am. Rep. 213.

35 Prewitt v. State, 106 Miss. 82, 63 So. 330, 6 A. L. R. 1476; United States v. Holmes, Fed. Cas. No. 15,382, 1 Cliff. 98; James v. State, 193 Ala. 55, 69 So. 569, Ann. Cas. 1918B, 119.

It is well settled that, where a person's mental condition is in question, evidence may be offered of insanity for a reasonable time both before and after the period covered by the claimed derangement.[36] This is offered, not only on the theory that insanity once shown to exist is presumed to continue, but that the previous or subsequent insanity tends to show that the mind of such person is predisposed towards insanity. Such former insanity, of course, must not have been at too remote a period;[37] and it seems that the opposition may rebut evidence of insanity by showing the sane condition of the person's mind, both before and after the time he is alleged to have been insane.[38] Proof of this character is not confined to actual insanity at some other period, but previous existence of any malady or disease which might result in insanity may be shown, as, for example, epileptic fits.[39]

It is now generally held, with few, if any, exceptions, that insanity of a person's blood relations, either direct or collateral, may be shown as corroborative evidence on the question of insanity, but only after the issue of insanity has been fairly raised by other evidence.[40] The reason for this rule is that it has be-

[36] Odom v. State, 174 Ala. 4, 56 So. 913; In re Huston's Estate, 163 Cal. 166, 124 P. 852; United States v. Holmes, Fed. Cas. No. 15,382, 1 Cliff. 98; Moore v. Com., 92 Ky. 630, 18 S. W. 833; Carr v. State, 96 Ga. 284, 22 S. E. 570; Lane v. Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430; People v. Hoch, 150 N. Y. 291, 44 N. E. 976; Com. v. Wireback, 190 Pa. 138, 42 A. 542, 70 Am. St. Rep. 625; Pinney's Will, 27 Minn. 280, 6 N. W. 791; Williams v. State, 37 Tex. Cr. R. 348, 39 S. W. 687; Meeker v. Boylan, 28 N. J. Law, 274.

[37] Goldberg v. West End Homestead Co., 78 N. J. Law, 70, 73 A. 128; Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58.

[38] Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; People v. Hoch, 150 N. Y. 291, 44 N. E. 976; Sayres v. Com., 88 Pa. 291; Gardner v. State, 96 Ala. 12, 11 So. 402; United States v. Holmes, Fed. Cas. No. 15,382.

[39] State v. Wright, 112 Iowa, 436, 84 N. W. 541; Com. v. Winnemore, 1 Brewst. (Pa.) 356.

[40] Guiteau's Case, 10 F. 161; People v. Harris, 169 Cal. 53, 145 P. 520; State v. Warner, 91 Vt. 391, 101 A. 149; McLeod v. State, 31

come a matter of common knowledge, recognized by the courts, that insanity is a malady which may be, and often is, transmitted from parent to child, until its presence in any immediate member of the family raises a suspicion of its possible presence in the subject, as another member of such family.[41] But, as a condition precedent to the offering of such proof, the insanity of the person in question must be shown by other competent evidence, and the evidence of insanity in the ancestor is offered in corroboration thereof, and not as original evidence.[42] There is also some suggestion in the authorities that the form of insanity shown in the ancestor must appear to be of a transmittable character, and not a mere personal case of insanity;[43] but this is disputed by other authorities, and the general rule seems to be that the character of the ancestor's insanity and the likelihood of it being transmitted to the person in question is a matter which goes to the weight rather than to the admissibility of the evidence of the ancestor's insanity.[44] But, as suggested supra, in the absence of direct proof of insanity on the part of the person in question, no inference exists that he is insane from the fact that his ancestors or parents were insane;[45] and proof of hereditary tendency to insanity will not of itself be sufficient to show mental disorder.[46] The proof of tendency towards insanity is

Tex. Cr. R. 331, 20 S. W. 749; Braham v. State, 143 Ala. 28, 38 So. 919; Com. v. Johnson, 188 Mass. 382, 74 N. E. 939; State v. Spencer, 21 N. J. Law, 197; Taylor v. State, 105 Ga. 746, 31 S. E. 764; People v. Sprague, 2 Parker Cr. R. (N. Y.) 43; People v. Gambacorta, 197 N. Y. 181, 90 N. E. 809, 18 Ann. Cas. 425.

[41] Hagan v. State, 5 Baxt. (Tenn.) 615; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; James v. State, 193 Ala. 55, 69 So. 569, Ann. Cas. 1918B, 119; Prewitt v. State, 106 Miss. 82, 63 So. 330, 6 A. L. R. 1476.

[42] Com. v. Dale, 264 Pa. 362, 107 A. 743, 6 A. L. R. 1482; People v. Gambacorta, 197 N. Y. 181, 90 N. E. 809, 18 Ann. Cas. 425.

[43] Com. v. Dale, 264 Pa. 362, 107 A. 743, 6 A. L. R. 1482.

[44] James v. State, 193 Ala. 55, 69 So. 569, Ann. Cas. 1918B, 119; Dillman v. McDanel, 222 Ill. 276, 78 N. E. 591, 113 Am. St. Rep. 400; Prentis v. Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

[45] Pringle v. Burroughs, 185 N. Y. 375, 78 N. E. 150, 7 Ann. Cas. 264.

[46] Pringle v. Burroughs, 185 N. Y. 375, 78 N. E. 150, 7 Ann. Cas. 264.

in such case merely corroborative proof to follow and support direct proof tending to show insanity of the person in question.

§ 554. Judgment in lunacy as proof

Where a person is found non compos mentis in a regularly instituted lunacy proceeding, the judgment of that fact is evidence of the insanity of the person so found to be non compos, in any other subsequent proceeding in which that fact may be an issue. However, this applies only to valid adjudications, and where such proceeding is invalid on its face, or was rendered without proper notice, it will not be admissible.[47]

It is the general rule that such judgments, or findings, are received as evidence of the mental condition of the person in question at the time of the inquisition in question. Whether or not it is conclusive evidence is a divided question, some authorities contending that it is a proceeding in rem and binding on third parties, and other authorities holding to a contrary view, on the ground that the proceeding is prima facie only. We think the general rule is, in the absence of local statutes to the contrary, that adjudications of insanity are receivable as conclusive evidence of the person's mental condition only as of the date of the finding or judgment, and as against persons who were party to the proceeding.[48] Otherwise, it is merely prima facie evidence of that fact.

The courts are divided as to whether an adjudication of insanity will be taken as evidence of the person's mental condition prior to the date of the judgment. The general rule seems to be

[47] Hanson v. Hanson, 234 F. 853, 148 C. C. A. 451; McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280; In re Phillips, 158 Mich. 155, 122 N. W. 554; Wait v. Maxwell, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; Hunt v. Searcy, 167 Mo. 158, 67 S. W. 206.

[48] Rath's Committee v. Smith, 180 Ky. 326, 202 S. W. 501; Southern Tier Masonic Relief Ass'n v. Laudenbach (Sup.) 5 N. Y. S. 901; Holliday v. Shepherd, 269 Ill. 429, 109 N. E. 976, 7 A. L. R. 558; Witty v. State, 69 Tex. Cr. R. 125, 153 S. W. 1146; Pritchett v. Thomas Plater & Co., 144 Tenn. 406, 232 S. W. 961; Avery v. Avery, 42 Cal. App. 100, 183 P. 453.

that it will not be received as evidence of mental unsoundness existing prior to the judgment,[49] unless the judgment itself relates back or overreaches an anterior date, in which case it is usually received for what it is worth as evidence of the subject's mental condition since such date.[50]

As a general rule, a finding in a lunacy proceeding, regularly entered, will be received as prima facie evidence of the subject's mental condition in any subsequent proceeding in which such mental condition is an issue.[51] The remoteness of the proceeding goes rather to the weight to be given the finding than to its admissibility.[52] It is still held to be evidence of insanity, even where it has been superseded on appeal.[53] The general rule applies with equal force to lunacy judgments in sister states and foreign countries whose procedure is similar to our own; and, in the absence of a showing to the contrary, it will be presumed that such judgments have the same force under the laws where entered as in the forum state.[54] Of course, a foreign adjudication procured under fraud may be attacked, either directly or

[49] Avery v. Avery, 42 Cal. App. 100, 183 P. 453; Succession of Hebert, 33 La. Ann. 1099; Uecker v. Zuercher, 54 Tex. Civ. App. 289, 118 S. W. 149; Shores-Mueller Co. v. Palmer, 141 Ark. 64, 216 S. W. 295; Nichols v. Pool, 47 N. C. 23; Westerland v. First Nat. Bank of Carrington, 38 N. D. 24, 164 N. W. 323, 7 A. L. R. 563.

[50] Yauger v. Skinner, 14 N. J. Eq. 789; Richie v. Shepard, 158 App. Div. 192, 143 N. Y. S. 19; Schindler v. Parzoo, 52 Or. 452, 97 P. 755; Bond v. State, 129 Tenn. 75, 165 S. W. 229; Hutchinson v. Sandt, 4 Rawle (Pa.) 234, 26 Am. Dec. 127.

[51] Hale v. Harris, 169 Mich. 172, 134 N. W. 1111; Holliday v. Shepherd, 269 Ill. 429, 109 N. E. 976, 7 A. L. R. 558; Rowan v. Hodges (Tex. Civ. App.) 175 S. W. 847; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1; Taylor v. Taylor, 174 Ind. 670, 93 N. E. 9.

[52] People v. Farrell, 31 Cal. 576; Taylor v. Taylor, 174 Ind. 670, 93 N. E. 9; McAllister v. Rowland, 124 Minn. 27, 144 N. W. 412, Ann. Cas. 1915B, 1006; Wheeler v. State, 34 Ohio St. 394, 32 Am. Rep. 372.

[53] Grimes v. Shaw, 2 Tex. Civ. App. 20, 21 S. W. 719.

[54] Herndon v. Vick, 18 Tex. Civ. App. 583, 45 S. W. 852; Interdiction of Gasquet, 147 La. 722, 85 So. 884; Com. v. Kirkbride, 7

collaterally.[55] Whether the commitment of one to an asylum for the insane will be taken as proof of insanity depends largely upon the force given to such commitment by the local statutes. If the commitment has the force of an adjudication of insanity, it will usually be proof of that fact; if it merely amounts to a finding of necessity for confinement and treatment, it will not be received as evidence of mental condition.[56] The same is true of guardianship proceedings, where the effect of the appointment of the guardian is to establish the mental incapacity of the alleged non compos.[57] It has also been held that, in this connection, an adjudication of habitual drunkenness may be offered in subsequent proceedings in which mental capacity is an issue,[58] and it is said to be presumptive evidence, but not conclusive, evidence, of incapacity.

§ 555. Medical works as evidence

As most of our scientific knowledge of insanity has been drawn from the realm of medical research, it has been a matter of some concern as to how far medical books and articles treating of insanity may be offered in evidence or read before the jury trying the issue of insanity. The courts have not looked kindly upon such classes of evidence, and it seems to

Phila. (Pa.) 8; In re Baker's Estate, 176 Cal. 430, 168 P. 881; Harvey v. Rex, A. C. 601.

[55] Matter of Bergmann, 110 App. Div. 588, 97 N. Y. S. 346.

[56] In re Allen, 82 Vt. 365, 73 A. 1078, 26 L. R. A. (N. S.) 232; Dewey v. Allgire, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468; Breedlove v. Bundy, 96 Ind. 319; Succession of Schmidt, 125 La. 1065, 52 So. 160; Newton v. Mutual Ben. Life Ins. Co., 76 N. Y. 426, 32 Am. Rep. 335; Mitchell v. Stanton (Tex. Civ. App.) 139 S. W. 1039.

[57] Willwerth v. Leonard, 156 Mass. 277, 31 N. E. 299; Redden v. Baker, 86 Ind. 191; Thorpe v. Hanscom, 64 Minn. 201, 66 N. W. 1; Messenger v. Bliss, 35 Ohio St. 587; Williams v. Robinson, 39 Vt. 267.

[58] Lewis v. Jones, 50 Barb. (N. Y.) 645; Leckey v. Cunningham, 56 Pa. 370; In re Johnson's Estate, 57 Cal. 529; Will of Slinger, 72 Wis. 22, 37 N. W. 236.

have been condemned in the early English cases,[59] and the tendency of American courts has been to hold that such books cannot be read in evidence.[60] Whether excerpts from medical works and journals can be read to or in hearing of the jury seems to rest largely within the discretion of the trial judge.[61] The appellate courts have repeatedly refused to review the refusal of the trial court to allow them to be so read,[62] but have refused to reverse cases because counsel was allowed to read such works to the jury, unless it clearly appeared that the trial court had abused its discretion.[63] Counsel have ordinarily been allowed the privilege of quoting from and referring to celebrated cases in the course of their argument; but this, too, is a matter of discretion on the part of the trial judge.[64]

§ 556. Estoppel to deny after affirming insanity

Where a normal person has once asserted and assisted in establishing another's insanity, he will not thereafter be allowed to deny it as existing during the time it was so established. This is especially true where the rights of third parties have intervened. It is founded on the old equitable principle that one will not be allowed to blow both hot and cold from the same mouth. As an example of the application of this principle, it has been held that a wife, who has procured a divorce from her

[59] Reg. v. Couch, 1 Cox, Cr. Cas. 94; Reg. v. Taylor, 13 Cox, Cr. Cas. 77.

[60] Macfarland's Trial (N. Y.) 8 Abb. Prac. (N. S.) 57.

[61] State v. Soper, 148 Mo. 217, 49 S. W. 1010.

[62] Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1002, 39 L. R. A. 305, 330; Boyle v. State, 57 Wis. 472, 15 N. W. 827, 46 Am. Dec. 41; Legg v. Drake, 1 Ohio St. 287; State v. O'Neil, 51 Kan. 651, 33 P. 287, 24 L. R. A. 555; State v. Klinger, 46 Mo. 224.

[63] Wade v. De Witt, 20 Tex. 398; State v. Hoyt, 46 Conn. 343; State v. O'Neil, 51 Kan. 651, 33 P. 287, 24 L. R. A. 555.

[64] Stilling v. Town of Thorp, 54 Wis. 534, 11 N. W. 908, 41 Am. Rep. 60; People v. Wheeler, 60 Cal. 581, 44 Am. Rep. 70; Mutual Life Ins. Co. of Baltimore v. Bratt, 55 Md. 200; State v. O'Neil, 51 Kan. 651, 33 P. 287, 24 L. R. A. 555.

husband on the grounds that he was insane at the time of their marriage, will not be allowed to deny his insanity in a subsequent action brought to set aside a conveyance of property made to her by such husband, and claimed to be void on account of his insanity at the time such conveyance was made.[65]

§ 557. Rebuttal evidence

Where the question of insanity has been raised by the evidence of one of the parties to the action, the other party may rebut the same by the introduction of any relevant evidence tending to show the party in question to be sane.[66] Such rebuttal is not confined to mere denial of the evidence of insanity already introduced in the first instance, but other relevant acts may be shown, etc., tending to show sanity, provided they are not too remote and are confined within a reasonable period.[67]

Where new matter is introduced in the rebuttal, the first party should have reasonable opportunity for surrebuttal testimony tending to refute the same; but it has been held in this connection that the fact that the testimony of an expert witness was offered tending to prove the person in question to be sane will not call for rebutting evidence on such surrebuttal.[68]

§ 558. Opinion evidence, in general

Because of the peculiar nature of the subject and the difficulty of proof, opinion evidence is coming to occupy an increasingly important place in trials where the mental condition is an issue. While, as a general rule, a witness is not allowed to give an opinion with reference to a fact sought to be proven, because he would thereby invade the province of the jury, whose particular

[65] Warfield v. Warfield, 76 Iowa, 633, 41 N. W. 383.

[66] Com. v. Eddy, 7 Gray (Mass.) 583; Jordan v. People, 19 Colo. 417, 36 P. 218.

[67] United States v. Holmes, Fed. Cas. No. 15382, 1 Cliff. 98.

[68] People v. Hill, 116 Cal. 562, 48 P. 711.

function it is to draw conclusions from the evidence introduced, yet in the proof of the mental phenomena, a greater latitude is allowed. Since it is impossible to bring certain facts and impressions before the jury in their actual light, a statement of the impression formed upon the mind of the witness, in the form of an opinion, is permitted. Also, persons who have particular skill in certain branches of knowledge, e. g., mental phenomena, are often able to detect conditions which are oblivious to the uninitiated; and persons having no particular skill in that branch of knowledge are yet often led to special knowledge of mental condition by constant association and observation. In both cases, it may be all but impossible to put into words all the steps by which the result has been arrived at; all that can be given with any degree of accuracy is the mental picture which results. This conception of the witness is what is known as opinion evidence. It must be kept in mind that insanity is a status, rather than a physical fact, and its elements may be formed in the mind more easily than they can be expressed in words. For the jury to arrive at a just conclusion, it is often necessary for the witness to express in an opinion what he cannot put into words; and for this reason opinion evidence is received in actions where insanity is an issue.

An opinion, in the sense here used, is the conception of the witness as to a person's sanity. It is the mental conclusion formed in the mind of the witness from the facts which have come to his attention, as opposed to the facts themselves. The statement, therefore, that the witness has never seen anything wrong with the alleged insane person's mind is a statement of a fact, rather than an expression of opinion.[69] Opinion evidence, as applied to insanity, falls into two general classes, viz.: Expert opinion evidence, or the opinion evidence of those having special skill in the detection and treatment of insanity and mental diseases; and nonexpert opinion evidence, or the opinion evi-

[69] Taylor v. State, 49 Tex. Cr. R. 7, 90 S. W. 647.

dence of those who by association or observation have had particular opportunity for arriving at an estimate of a person's sanity.

§ 559. Expert testimony, in general

Probably in no class of cases does expert testimony form so large a part of the evidence as in those involving insanity, and not infrequently it forms the bulk of the evidence from which the court or jury must determine the subject's sanity or insanity. Its value in aiding the court and jury in arriving at a clear understanding of difficult and subtle cases has long been recognized. Yet, while it is very pertinent, expert testimony is not essential to the establishment of a person's mental condition, as that fact may be, and often is, established by facts and circumstances, as in the case of any other issue.[70] On the other hand, the testimony of competent expert witnesses may be sufficient to establish the sanity or insanity of an alleged non compos person, without further testimony on the issue.[71] Where such testimony is received, its weight and credibility is for the jury in the same manner as other evidence,[72] and in the exercise of this right the jury may hold it of little account, or even reject it entirely.[73] In cases where the acts of the alleged non compos and other facts and circumstances tend to strongly contradict the opinion expressed by the expert witness, or witnesses, such opinion will not be allowed to outweigh this other evidence.[74] Also, where there is much conflict between the opinions of the different expert wit-

[70] People v. Finley, 38 Mich. 482; Tomkins v. Tomkins, 1 Bailey (S. C.) 92, 19 Am. Dec. 656; In re Lyddy's Will (Sur.) 4 N. Y. S. 468.

[71] In re Fitzgerald, 30 N. J. Eq. 59; Sponable v. Hanson, 87 Mich. 204, 49 N. W. 644.

[72] Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99; McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; People v. Barberi (Sup.) 47 N. Y. S. 168; Francke v. His Wife, 29 La. Ann. 302.

[73] Williams v. State, 50 Ark. 511, 9 S. W. 5; Rankin v. Rankin, 61 Mo. 295.

[74] Rankin v. Rankin, 61 Mo. 295; Palmer's Estate, 5 Wkly. Notes Cases (Pa.) 542; Harper v. Harper, 1 Thomp. & C. (N. Y.) 354.

nesses, and where graduates of different schools of medicine are of opposite opinions in their views on the subject, this class of evidence loses much of its weight and becomes of little value.[75] But where such witnesses are shown to be especially qualified, or to have had opportunity of contact with and observation of the alleged non compos person, their opinions are considered by the courts as an important aid to the jury in reaching a correct decision and are entitled to great weight.[76]

There has been some conflict among the decisions of the different states as to the weight to be given the different classes of opinion evidence. In some jurisdictions, the opinion of expert witnesses is given more weight than that of nonexpert witnesses.[77] In other jurisdictions, the contrary is true.[78] The better rule seems to be, however, that this is a matter for the jury, who alone are authorized to pass upon the weight to be given the testimony, and who have the witnesses before them and are in the best position to judge their credibility. As throwing light on the weight and sufficiency of the evidence, it is competent to show the experience and extent of the witness' knowledge and the opportunity he has had for observation.[79]

[75] Jamison v. Jamison's Will, 3 Houst. (Del.) 108; Burgo v. State, 26 Neb. 639, 42 N. W. 701.

[76] Choice v. State, 31 Ga. 424; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Parsons v. State, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193; Pannell v. Com., 86 Pa. 260; Montague v. Allan's Ex'r, 78 Va. 592, 49 Am. Rep. 384; Jarrett v. Jarrett, 11 W. Va. 584; Stevens v. Leonard, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446; Hall v. Perry, 87 Me. 569, 33 A. 160, 47 Am. St. Rep. 352.

[77] State v. Reidell, 9 Houst. (Del.) 470, 14 A. 550; Watson v. Anderson, 13 Ala. 203; Commonwealth ex rel. Helmbold v. Kirkbride, 11 Phila. (Pa.) 427; Hendrix v. Money, 1 Bush (Ky.) 306; McLeod v. State, 31 Tex. Cr. R. 331, 20 S. W. 749.

[78] Kelly v. Perrault, 5 Idaho, 221, 48 P. 45.

[79] Watson v. Anderson, 13 Ala. 202; Sanders v. State, 94 Ind. 147; Carpenter v. Calvert, 83 Ill. 62; Ryder v. State, 100 Ga. 528, 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. Rep. 334; Kempsey v. McGinniss, 21 Mich. 123; State v. Hundley, 46 Mo. 414; Flynt v. Bodenhamer,

§ 560. Qualifications of expert witness

An expert witness in an insanity case is, as the name implies, a witness who has special skill and learning in the detection and treatment of mental diseases and abnormal mental conditions. But, from a practical standpoint, it is not an easy matter to determine just what amount of knowledge and experience is necessary in each particular case, in order for the witness to measure up to the requirements. Whether the witness is qualified as an expert in the case in question is a matter of law, for the trial judge to decide.[80] Having the witness before him, where he can the more accurately judge such witness' fitness and qualification, the matter rests very largely within the sound discretion of the trial court,[81] and his decision, upon appeal, will be presumed to have been proper, in the absence of a showing to the contrary.[82] The witness' own opinion as to his own qualification has been held to be immaterial.[83] Out of the numerous authorities, among which there is more or less conflict, several well-defined rules have been evolved to aid the trial courts in measuring the qualifications of such witness.

(1) As a general rule, such witness should have a general knowledge of medicine as a practicing physician, with a general knowledge of the mind and its functions, and should have a general knowledge of the mental phenomena and the disorders which attack the mind.[84] But this is not without exceptions, and it has

80 N. C. 205; Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072; First Nat. Bank of Easton v. Wirebach's Ex'r, 106 Pa. 37.

[80] Inhabitants of Fayette v. Inhabitants of Chesterville, 77 Me. 28, 52 Am. Rep. 741; Boardman v. Woodman, 47 N. H. 120; Flynt v. Bodenhamer, 80 N. C. 205.

[81] Inhabitants of Fayette v. Inhabitants of Chesterville, 77 Me. 28, 52 Am. Rep. 741.

[82] Melendy v. Spaulding, 54 Vt. 517.

[83] Boardman v. Woodman, 47 N. H. 120; Braham v. State, 143 Ala. 28, 38 So. 919.

[84] People v. Schuyler, 106 N. Y. 298, 12 N. E. 783; Abbott v. Com., 107 Ky. 624, 55 S. W. 196; State v. Windsor, 5 Har. (Del.) 512; Potts

been held in some jurisdictions that persons who had especially qualified themselves to pass on mental conditions might qualify as experts, although they have no general knowledge of medicine and are not even of the medical profession. For example, while it is held that clergymen, who have read extensively on moral and intellectual science, but none on insanity, and who have no experience in the practice of medicine, cannot qualify as an expert witness on insanity,[85] yet a Catholic priest, whose duties in administering the sacraments required him to pass on the mental condition of the communicant, and whose professional studies entered into that field, could so qualify,[86] as could the warden or superintendent of an asylum, who had had years of experience in the care and observation of the insane.[87]

(2) Where the claimed mental derangement is of a common type, any regular physician in good standing, doing general practice, and who has studied the diseases of the mind along with the other diseases of the body, may testify as an expert, the extent of his learning going alone to his credibility.[88] This seems to be the general rule in England and a majority of the American states, but some of the states, notably Massachusetts, Maine, and Texas, are inclined to hold that unless, as an attending physician or otherwise, he has special opportunity to observe the alleged non compos, he should, in addition to his general knowledge of medicine, have had a reasonable amount of experience in the observation and treatment of mental derange-

v. House, 6 Ga. 324, 50 Am. Dec. 329; Inhabitants of Fayette v. Inhabitants of Chesterville, 77 Me. 28, 52 Am. Rep. 741; People v. Finley, 38 Mich. 482; State v. Reddick, 7 Kan. 143.

[85] Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1000, 39 L. R. A. 305.

[86] In re Toomes' Estate, 54 Cal. 509, 35 Am. Rep. 83.

[87] Com. v. Wireback, 190 Pa. 138, 42 A. 542, 70 Am. St. Rep. 625. See Western Union Tel. Co. v. Tweed (Tex. Civ. App.) 138 S. W. 1155.

[88] Abbott v. Com., 107 Ky. 624, 55 S. W. 196; Hathaway's Adm'r v. National Life Ins. Co., 48 Vt. 336; Phelps v. Com., 32 S. W. 470, 17 Ky. Law Rep. 706; State v. Crisp, 126 Mo. 605, 29 S. W. 699; Dolbeer's Estate, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795; Ledwith v. Claffy, 18 App. Div. 115, 45 N. Y. S. 612.

ments, or have made some special study of the mental phenomena and of the detection and treatment of mental diseases resulting in derangements, before he can qualify as an expert witness.[89]

(3) Where the claimed insanity is not of the commoner type, but is of a rare, unusual, or complex nature, then the witness called as an expert should qualify by showing a reasonable amount of experience in the study and investigation or observation of the kind or class of insanity under investigation.[90]

Where the witness has been adjudged competent by the court to testify as an expert witness, it is not competent to show by other witnesses his experience, etc., to sustain his testimony, unless his competency or reputation has been attacked.[91]

§ 561. Scope of examination

The scope of the examination of the expert witness in insanity cases is determined by the purpose of his testimony. Since his office or purpose is largely that of an expert adviser of the jury, his testimony should be directed towards furnishing the jury with a means of viewing the testimony from a scientific standpoint. In addition, his opinion should be limited to the competent evidence, pertinent to the case in hand.

As preliminary to an expert witness' testimony, it has been held proper to allow testimony showing his position in his profession, the extent and nature of his professional knowledge, his means of information, and the unprejudiced state of his mind; and such matters may be brought out as a predicate for the wit-

[89] Com. v. Brayman, 136 Mass. 438; In re Whiting, 110 Me. 232, 85 A. 791; Hutchins v. Ford, 82 Me. 363, 19 A. 832; Russell v. State, 53 Miss. 367; McLeod v. State, 31 Tex. Cr. R. 331, 20 S. W. 749; Hutchins v. Ford, 82 Me. 363, 19 A. 832; Com. v. Rich, 14 Gray (80 Mass.) 335.

[90] People v. Millard, 53 Mich. 63, 76, 18 N. W. 562; Green v. State, 64 Ark. 523, 43 S. W. 973; McLeod v. State, 31 Tex. Cr. R. 331, 20 S. W. 749; Russell v. State, 53 Miss. 367; Hutchins v. Ford, 82 Me. 363, 19 A. 832; Com. v. Rich, 14 Gray (Mass.) 335.

[91] Western Union Tel. Co. v. Tweed (Tex. Civ. App.) 138 S. W. 1157; Rogers, Expert Testimony, § 37.

ness' testimony, as they not only tend to show his qualification as an expert, but also go to the weight to be given his testimony.[92] The extent to which such matters may be gone into is largely within the sound discretion of the trial judge.[93]

It is held to be permissible for an expert witness to explain the nature and usual symptoms of insanity, accompanying his explanation with such comparisons and illustrations as will likely make his explanation clear to the jury.[94] On the other hand, it is held that, while such witness may explain the symptoms and causes of insanity, in order to make his testimony on the subject clear, yet he will not be allowed to illustrate it by describing like cases which have come under his observation, or which he considers analogous to that before the court.[95] Nor may the witness testify what mental science or writers on the subject teach with reference to the matter, since it would be going too far afield;[96] but the witness may, on cross-examination, be shown medical works and journals by recognized authors, and asked if he agreed with them.[97]

It has been held to be good practice to preface a question calling for an expert opinion with an inquiry as to the particular

[92] Clark v. Fisher, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; Jamison v. Jamison's Will, 3 Houst. (Del.) 108; People v. Lake, 2 Parker, Cr. R. (N. Y.) 215; Gay v. Union Mut. Life Ins. Co., Fed. Cas. No. 5,282, 9 Blatchf. 142.

[93] Davis v. United States, 165 U. S. 377, 17 S. Ct. 360, 41 L. Ed. 754.

[94] Lake v. People, 1 Parker Cr. R. (N. Y.) 495; United States v. Guiteau, 1 Mackey (12 D. C.) 498, 47 Am. Rep. 247; Fain v. Com., 78 Ky. 183, 39 Am. Rep. 213; Com. v. Buccieri, 153 Pa. 535, 26 A. 228; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

[95] Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; Richmond's Appeal, 59 Conn. 226, 22 A. 82, 21 Am. St. Rep. 85; People v. Holmes, 111 Mich. 364, 69 N. W. 501; Com. v. Buccieri, 153 Pa. 535, 26 A. 228.

[96] Davis v. United States, 165 U. S. 373, 17 S. Ct. 360, 41 L. Ed. 750.

[97] State v. Winter, 72 Iowa, 627, 34 N. W. 475; State v. Coleman, 20 S. C. 441.

symptoms of insanity,[98] and that the extent and manner that the mind is affected by disease may be inquired into,[99] as may the effect of drugs on the mind, and the effect of an inherent predisposition to insanity and of great mental stress and excitement on the mind.[1] It has also been held that, after an expert witness has answered a hypothetical question to the effect that the facts included in the question, if true, indicate that the person in question is insane, he may be questioned further as to the state and degree of mental unsoundness so indicated, and may be asked how far such derangement will disqualify a person for business and render him unconscious of the nature of his conduct.[2] In the same connection, the witness has been allowed to estimate the mental capacity of such person by comparison; e. g., that he had no more mind than a small child,[3] and to illustrate this the witness may refer to the acts and speech of the alleged non compos during the trial.[4]

But it would seem that the examination of the expert witness should not go too deeply into the subject of the mind, as such testimony could be of little use to the ordinary laymen who compose the jury. Therefore technical explanations of the structure of the brain, how it may be affected by irritation, etc., so as to disorganize the person's ideas, are not usually allowed, inasmuch as it is the office of the expert witness to give the jury the result of such investigation in the form of an opinion.[5] This being true, the tendency is not to allow testimony which is argumentative in its nature. For example, it has been held that such witness will not be allowed to give in support of his theory specific examples of other cases where the result tends to bear him out in

98 McCann v. People, 3 Parker, Cr. R. (N. Y.) 272.
99 Kempsey v. McGinniss, 21 Mich. 123.
1 Dejarnette v. Com., 75 Va. 867; Rogers v. State, 33 Ind. 543.
2 Reed v. State, 62 Miss. 405.
3 Richmond's Appeal, 59 Conn. 226, 22 A. 82, 21 Am. St. Rep. 85.
4 Com. v. Buccieri, 153 Pa. 535, 26 A. 228.
5 Anderson v. State, 42 Ga. 9.

his testimony,[6] or testify that his theory of the matter is supported by the authorities on the subject.[7] It has also been held that he may not state what he considers the most frequent causes of insanity.[8] On cross-examination, where the purpose is to attack the experience and knowledge of the witness, as going to the weight of his testimony, a much more liberal rule will be recognized, and such matters may be gone into more fully.

§ 562. Limitations upon expert testimony

It is not within the province of an expert witness, testifying in an insanity case, to define words having a well-understood meaning, as that is a question for the court,[9] and is usually taken care of in the court's charge; but the witness may be asked such questions on cross-examination, in order to test his knowledge. For the same reason it is not permissible for an expert witness to testify as to what state of facts is evidence of a given condition[10] directly opposite to the established rule on the subject, as, for example, that a person affected by delirium tremens, so as to lose control over his actions, is not insane.[11] In other words, an expert witness may not pass on what constitutes legal insanity, as distinguished from insanity known to the medical world. But it has been held that the admission of such evidence will not be error, where the witness merely testified to abstract conditions and theories, and his testimony is not addressed directly to the mental condition of the alleged insane person,[12] or where the contrary is so obvious as to be a matter of common knowledge.[13]

6 People v. Holmes, 111 Mich. 364, 69 N. W. 501.
7 State v. Winter, 72 Iowa, 627, 34 N. W. 475.
8 Hall v. Com., 12 A. 163, 22 Wkly. Notes Cas. (Pa.) 25.
9 Goodwin v. State, 96 Ind. 550.
10 Rush v. Megee, 36 Ind. 69.
11 French v. State, 93 Wis. 325, 67 N. W. 706.
12 Marceau v. Traveler's Ins. Co., 101 Cal. 338, 35 P. 856, 36 P. 813.
13 McHugh v. Fitzgerald, 103 Mich. 21, 61 N. W. 354.

§ 563. Limitation—General capacity of subject

There is considerable conflict among the authorities as to how far an expert witness will be allowed to express an opinion on the mental capacity of an alleged non compos person to do or refrain from doing a certain act. The objection to this class of testimony is that it allows the witness to usurp the functions of the jury and pass on the very point at issue. There are some authorities that hold that such testimony is admissible as the expert opinion of the witness;[14] but the weight of authority in Texas and a majority of the states is to the effect that the opinion that the expert witness may give is limited to the general state of the alleged insane person's mind, and his general capacity to know and understand the nature and consequence of his acts, and he will not be allowed to testify that such person has or has not mental capacity to do the particular act in question.[15] It has been suggested that the distinction between the two lies in the fact that the question of capacity generally will be treated as a matter of fact, and is therefore the proper subject of testimony; while, on the other hand, an application of the legal rules to capacity to do a particular act is to be treated as a question of law, or a mixed question of law and fact, and is a matter for the court and jury to pass on.[16] It is pointed out that to allow a witness to testify that in his opinion an alleged non compos did not have mental capacity to do an act in question—e. g., execute a deed or make a will—is to allow the witness to pass on

[14] Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441; Beaubien v. Cicotte, 12 Mich. 459; Frizzell v. Reed, 77 Ga. 731; Rambler v. Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444; Stuckey v. Bellah, 41 Ala. 707; Clary's Adm'rs v. Clary, 24 N. C. (2 Ired.) 78; Johnson v. Culver, 116 Ind. 289, 19 N. E. 129.

[15] Brown v. Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64; In re Estate of Cheney, 78 Neb. 276, 110 N. W. 732; Schneider v. Manning, 121 Ill. 376, 12 N. E. 267; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; White v. Bailey, 10 Mich. 159; In re Blood's Will, 62 Vt. 359, 19 A. 770.

[16] Hamrick v. State, 134 Ind. 324, 34 N. E. 3.

a legal question, the legal effect of the will or deed, which is a question for the judge, and to pass on the mental capacity of such person to do the act in question, which is a question of fact for the jury. In other words, the case, both law and fact, would be decided by a physician, not by the lawfully constituted court of justice.[17]

Some of the authorities attempt to qualify the general rule by holding that an expert witness may be allowed to testify that an alleged non compos is insane, or rational, upon a general subject, or with reference to a particular class of things, e. g., that he has capacity to make a will or execute a deed, in general, and that from this the jury may draw their own conclusions as to the alleged insane person's capacity to do the particular act in question.[18] This distinction is not made by the majority of the authorities.

§ 564. Office of opinion, in general

As indicated supra, the necessity for the admission of opinion evidence is founded upon the idea that it is impossible, or impracticable, to describe to the jury the speech, actions, and mannerisms which go to show the mental state, and the exact manner in which they impress the witness. Where this is not the case, the reason for the admission of opinion evidence fails. Therefore, where all the facts are before the jury in their true and actual light, it is for the jury to draw their own inference therefrom as to the person's sanity.[19] For a like reason, the expert witness may not interpret the acts of the alleged non compos, done in the presence, or within the knowledge of, the jury, who would ordinarily have the same opportunity as the witness to become acquainted with the actual facts, unless special train-

[17] Williams v. Livingston, 52 Tex. Civ. App. 275, 113 S. W. 786.

[18] Hayes v. Candee, 75 Conn. 135, 52 A. 828; Poole v. Dean, 152 Mass. 589, 26 N. E. 406.

[19] People v. Barber, 115 N. Y. 475, 22 N. E. 182; Marison v. Macceline, 24 Scotch Sess. Cas. 625. See Van Zandt v. Mutual Ben. Life Ins. Co., 55 N. Y. 169, 14 Am. Rep. 215.

ing or knowledge is required for the interpretation of such acts, etc., as, for example, whether acts, not in themselves irrational, were prompted by insane delusions, or whether the alleged non compos was capable of applying the rules of right and wrong to a given set of facts and circumstances.[20] The interrogation in such case should be confined to the general question of whether the alleged non compos was capable of telling the right from the wrong,[21] or the witness should be required to give his opinion as to such alleged insane person's usual and ordinary capacity to determine acts of their general kind or class,[22] leaving it to the jury to determine, in the light of such opinion, the question of capacity to do the particular act or acts then before them for determination.

§ 565. Competency to explain nature and effect of insanity

It seems to be competent for the expert witness to testify to the nature and forms of insanity of the general character of that alleged to be affecting the person in question and to explain the effect of such mental diseases on the control of such person over his actions; and he may also testify to such facts with reference to the case then in hand, where he has sufficiently observed the alleged non compos to be able to testify from his own knowledge.[23]

[20] State v. Scott, 41 Minn. 365, 43 N. W. 62; Com. v. Rich, 14 Gray (Mass.) 335; Goodwin v. State, 96 Ind. 550; In re Nelson, 39 Minn. 204, 39 N. W. 143; Crowley v. Appleton, 148 Mass. 98, 18 N. E. 675.

[21] State v. Leehman, 2 S. D. 171, 49 N. W. 3.

[22] Poole v. Dean, 152 Mass. 589, 26 N. E. 406; Melendy v. Spaulding, 54 Vt. 517.

[23] People v. Osmond, 138 N. Y. 80, 33 N. E. 739; Koenig v. Globe Mut. Life Ins. Co., 10 Hun, 558.

§ 566. As privileged testimony

The physician, of all persons must of a necessity hold a close and confidential place in the lives and homes of his patients. This being true, the law will not allow him in certain cases to become an adverse witness and divulge the secrets he has gathered while in such home. Moreover, to enable the physician to properly exercise his skill, it is sometimes necessary to divulge to him facts that would not otherwise be divulged. This information the patient would often hesitate to give, unless the mouth of such physician was closed with reference to the facts so revealed to him. Therefore, as a matter of public policy, the law will not ordinarily allow the physician to testify to facts coming to his knowledge while in professional attendance upon another.

As a general rule, this applies to a physician testifying with reference to a person's sanity. In several states, notably Alabama and New York, there are statutes covering this particular matter.[24] In the absence of statutes, it may be stated as the general rule that the opinion of a physician of a person's sanity during a given period, based upon the knowledge acquired while attending such person in a professional capacity,[25] is not admissible over such party's objection.

§ 567. Limitation of rule

But for the testimony of an expert witness in an insanity case to be inadmissible, because it violates the rule against privileged communications, the opinion given in such case must have been based upon information or facts which came to him as necessary to enable him to act in his professional capacity, and where it

[24] Code Ala. 1923, § 7721; Civil Practice Act N. Y. § 352; Rev. St. Mo. 1919, § 5418; Comp. Laws Mich. 1915, § 12550; Code Iowa 1927, § 11263.

[25] Renihan v. Dennin, 103 N. Y. 574, 9 N. E. 320, 57 Am. Rep. 770; Heuston v. Simpson, 115 Ind. 62, 17 N. E. 261, 7 Am. St. Rep. 409; In re Goldthrop, 94 Iowa, 336, 62 N. W. 845, 58 Am. St. Rep. 400; Davis v. Tarver, 65 Ala. 98.

appears that this was not the case, or that the opinion in question was based upon the facts open to the observation of any person who should see and converse with the alleged insane person, the objection would not apply.[26] Merely being in the position of an attending physician, as, for example, where a physician has supervision over the medical condition of the prisoners in a jail, but has not acquired his information while attending the alleged insane prisoner in a professional capacity, will not be sufficient to invoke the rule.[27] Neither does the rule apply where the examination is for the known purpose of qualifying the physician to testify, as where an alleged non compos person is examined by a physician appointed for that purpose by the prosecution in a criminal case.[28]

§ 568. Waiver of privilege

As a witness is prima facie competent with respect to his privilege to testify, and an objection to his testimony on the ground that it is based on privileged communications is a matter looking to the exclusion of his testimony, it seems that the duty rests upon the party seeking to exclude such testimony to show such facts as will bring the testimony in question within the scope of the objection.[29] The rule which excludes the testimony of an attending physician is in the nature of a privilege only, and may be waived by the person interested, and for whose benefit it operates.[30] It is well settled that the alleged insane party himself may waive it, and this may be done by any act which holds the physician out as one having knowledge of his sanity, as, for example, in calling on the witness to attest the will of the per-

[26] Staunton v. Parker, 19 Hun, 56.

[27] People v. Schuyler, 106 N. Y. 298, 12 N. E. 783.

[28] People v. Hoch, 150 N. Y. 291, 44 N. E. 976; People v. Kemmler, 119 N. Y. 580, 24 N. E. 9.

[29] People v. Schuyler, 106 N. Y. 298, 12 N. E. 783.

[30] Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69; Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882; Thompson v. Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Staunton v. Parker, 19 Hun, 56.

son in question, since in attesting the will such witness is by implication attesting the capacity of the person executing the will,[31] or by calling such physician as a witness on the subject of insanity.[32]

§ 569. By whom waived

Just when the representatives of the alleged insane person may waive the right of such person to object to testimony based on privileged communication is not entirely clear. In New York it has been held that such objection cannot be waived by the executor or administrator of the party entitled to claim the advantage of the privilege.[33] But a different rule has been adhered to in other states, and the rule in New York has been distinguished from the general rule, on the ground that the Code of that state itself excludes such evidence, unless expressly waived by the party himself.[34] The rule supported by the weight of authority seems to be that the objection to testimony based on privileged communication may be waived by the heirs and personal representatives of the party entitled to the benefit of the privilege, where they represent the interests under adjudication.[35]

§ 570. Basis for opinion, in general

As a general rule, the opinion of the expert witness in an insanity case must be founded upon facts or things that are themselves competent evidence. The reason is obvious. The object of the expert is to aid the jury in deducting results and arriving at conclusions, and it is evident that in doing this they should base such deductions and conclusions only on what the jury it-

[31] Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

[32] Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

[33] Westover v. Ætna L. Ins. Co., 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1.

[34] Thompson v. Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552.

[35] Staunton v. Parker, 19 Hun, 56; Thompson v. Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882; Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

self could consider; i. e., competent evidence.[36] For example, such a witness cannot base an opinion upon the statements of others, hearsay in its character,[37] since, as we have seen supra,[38] such testimony is not in itself competent. It seems to be fairly well settled that evidence of the statements of third parties—i. e., persons other than the witness and the alleged non compos person—will not be admissible to prove insanity, and that an opinion based thereon will not be competent. The reason is that such evidence is hearsay in its nature, and is objectionable as not being the best evidence, and the person making the reported statements could be placed on the witness stand, where such statements could be placed under the sanction of an oath; the credibility of the witness can be measured by the jury and tested by cross-examination, after which its scientific worth can be measured by hypothetical questions based thereon.[39] Where the basis—i. e., the facts on which the opinion of an expert is founded—is not stated in the direct examination, such facts may be gone into on cross-examination, with a view of testing the competency and weight of the opinion. Otherwise, the court could have no means of knowing whether the opinion was based on competent evidence, and the jury would be deprived of a most certain means of measuring its weight and value.

[36] Rupe v. State, 42 Tex. Cr. 477, 61 S. W. 929; Wetherbee's Ex'rs v. Wetherbee's Heirs, 38 Vt. 454; Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072; Heald v. Thing, 45 Me. 392.

[37] Barber's Appeal, 63 Conn. 393, 27 A. 973, 22 L. R. A. 90; State v. Soper, 148 Mo. 217, 49 S. W. 1010; Van Deusen v. Newcomer, 40 Mich. 90; Hurst v. Chicago, R. I. & P. R. Co., 49 Iowa, 76; First Nat. Bank of Navasota v. McGinty, 29 Tex. Civ. 539, 69 S. W. 495.

[38] Supra, § 566.

[39] Heald v. Thing, 45 Me. 392; First Nat. Bank of Navasota v. McGinty, 29 Tex. Civ. 539, 69 S. W. 495.

§ 571. Necessity for basis

Moreover, it is obvious that such an opinion of an expert, without a substantial basis, is worthless. It follows that the facts forming the basis of the opinion must in themselves tend to support such opinion, as bearing on the sanity of the alleged non compos, and it is said that, when the facts upon which the opinion is based are neutral in their character, so as to be consistent with both soundness and unsoundness of mind, they cannot form the basis for an opinion.[40] Neither will facts which, standing alone, have no tendency to throw light on the mental condition of the alleged non compos, furnish a basis for an expert opinion.[41] But where such facts tend to throw light on the sanity of the person in question, it ceases to be a matter of admissibility, and becomes a question of the weight to be given the evidence which is for the jury.[42] Similarly a hypothetical question is objectionable where it assumes a statement of facts on which no medical or expert opinion should be based.[43]

§ 572. Classes of evidence forming basis

The various classes of evidence which may form the basis for the opinion of an expert witness testifying in an insanity case fall into three well-defined classes, viz.: (1) Where the testimony of the witness is based on his personal examination and observation of the alleged insane person's condition. This usually occurs in the case of an attending physician, or of an expert who has been appointed to examine the alleged non compos with a view of qualifying as an expert witness on the person's mental condition. (2) The next class is where the expert witness gives his opinion after listening to the evidence in the case in question as the same is offered by both sides. (3) The last

40 Wheelock v. Godfrey, 100 Cal. 578, 35 P. 317.
41 Prentis v. Bates, 88 Mich. 567, 50 N. W. 637.
42 See § 523, supra.
43 Thornton's Ex'rs v. Thornton's Heirs, 39 Vt. 122.

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class is where the expert witness gives his opinion on the person's mental condition in answer to a hypothetical question. The two last classes differ only in this: In one case the witness is allowed to hear the facts as given from the witness stand and frame his opinion thereon, while in the other case the facts are grouped for him in the form of a supposed case and his opinion asked thereon. Neither of these classes, or methods, seems to be exclusive in itself, as an expert witness may base his opinion partially on proven facts and partially on testimony of other witnesses,[44] or from knowledge gained from a personal examination and the evidence given in the form of a hypothetical question.[45] However, it should be made clear on what his testimony is based, so that the jury may pass upon its weight; and where it is based upon the evidence it must be confined to an opinion on the facts. His doubts upon the question of sanity are inadmissible,[46] and he should not be allowed to give an opinion upon the value of other witnesses,[47] or whether or not he regards another witness as an authority on the subject of insanity,[48] as such questions go to the weight of the evidence and are for the jury.

§ 573. Personal examination of non compos

One of the commonest means of knowledge on the part of the expert witness testifying in an insanity case is that of personal examination and observation of the alleged non compos, noting his physical condition, acts, speech, and general demeanor.[49]

[44] In re Mason, 60 Hun, 46, 14 N. Y. S. 434.

[45] State v. Wright, 134 Mo. 404, 35 S. W. 1145.

[46] Sanchez v. People, 22 N. Y. 147.

[47] People v. Webster, 59 Hun, 398, 13 N. Y. S. 414.

[48] People v. Holmes, 111 Mich. 364, 69 N. W. 501.

[49] State v. Potts, 100 N. C. 457, 6 S. E. 657; McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; Taylor v. State, 83 Ga. 647, 10 S. E. 442; Pigg v. State, 43 Tex. 108; Murphy v. Com., 92 Ky. 485, 18 S. W. 163; Coyle v. Com., 104 Pa. 117; People v. Kemmler, 119 N. Y. 580, 24 N. E. 9; People v. Worthington, 105 Cal. 166, 38 P. 689; Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 A. 253; Bitner v. Bitner, 65 Pa. 347; Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106; Coryell

The means of securing the information is immaterial, so long as the witness has secured his information first-handed, and not from statements of others, or other sources, hearsay in character,[50] and shows himself to have had sufficient opportunity to familiarize himself with the person's mental condition. He may acquire the information while attending the party as a family physician,[51] by association with and observation of him,[52] or by examination and observation of such person, made for the express purpose of testing his sanity.[53] It would seem that such witness must base his opinion upon a general and reasonably thorough examination, not on a mere casual observation, or on isolated physical characteristics.[54] In this connection, it has been held that a witness employed by the prosecution may examine an alleged insane prisoner, while he is confined in jail, with a view of testifying to his mental condition, and such evidence is not subject to the objection that the prisoner was being compelled to furnish evidence against himself.[55] But it has also been held that the trial of a case may not be unreasonably interrupted or delayed, to enable such witness to examine and observe the alleged non compos and form an opinion of his mental condition.[56]

v. Stone, 62 Ind. 307; Crockett v. Davis, 81 Md. 134, 31 A. 710; Boardman v. Woodman, 47 N. H. 120; State v. Gould, 40 Kan. 258, 19 P. 739; Hall v. Perry, 87 Me. 569, 33 A. 160, 47 Am. St. Rep. 352.

50 First Nat. Bank of Navasota v. McGinty, 29 Tex. Civ. 539, 69 S. W. 495. See supra, § 543.

51 People v. Worthington, 105 Cal. 166, 38 P. 689; Pigg v. State, 43 Tex. 108.

52 Taylor v. State, 83 Ga. 647, 10 S. E. 442; Bitner v. Bitner, 65 Pa. 347; Frith's Case, 22 How. St. Tr. 307.

53 People v. Wood, 126 N. Y. 251, 27 N. E. 362; Murphy v. Commonwealth, 92 Ky. 485, 18 S. W. 163.

54 Frederickson v. State, 44 Tex. Cr. R. 288, 70 S. W. 754; McLeod v. State, 31 Tex. Cr. R. 331, 20 S. W. 749.

55 People v. Kemmler, 119 N. Y. 580, 24 N. E. 9; Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1000, 39 L. R. A. 305, 330.

56 State v. Crisp, 126 Mo. 605, 29 S. W. 699.

§ 574. Limitation of rule

As seen supra, the expert witness, testifying with reference to the mental condition of an alleged insane person, must, however, base his opinion on what he has observed, as otherwise such testimony would be mere hearsay. Hence he cannot base such an opinion in whole or in part upon what he has been told of the subject's various symptoms and condition, either by consulting physicians, by the husband or wife of the subject, or by an attendant upon the alleged insane person.[57] Neither can he base an opinion upon the testimony of other experts.[58] In addition to the objection that such evidence is hearsay, there is the additional objection that it is not the best evidence, as the persons who themselves observed the symptoms and conditions made the basis for the opinion should be called to testify, where the credibility of the witness and the accuracy of the statements could be tested by cross-examination, and the whole could be placed under the sanctity of an oath.

It is frequently the case that much of the knowledge of the expert witness is based on records kept by persons in attendance upon the alleged insane person or by the institution in which he may be confined; and it becomes important to know how far regularly kept records, as, for example, records regularly kept in an asylum where such person is being treated, are competent as a basis for an opinion for an expert, or whether it will fall under the general rule requiring that an expert's opinion be based on knowledge acquired first-handed. While there is some diversity of opinion, such records are admissible in evidence and usable as a basis for an expert opinion only where they are material to the question of the subject's mental condition, and where they are made by the witness or under his supervision and their correctness can be substantiated by him. In such case, they

[57] State v. Crisp, 126 Mo. 605, 29 S. W. 699.

[58] Heald v. Thing, 45 Me. 392; Wetherbee's Ex'rs v. Wetherbee's Heirs, 38 Vt. 454.

are in effect in the nature of a memorandum to refresh the witness' memory.[59] Other forms of records are but statements furnished by third persons, and objectionable as hearsay.

§ 575. Statement of basis as preliminary to opinion

It would seem that it is the better practice to require an expert witness testifying in an insanity case, and who is giving his opinion, based upon facts coming under his own observation, to relate, as a predicate for his opinion on the subject's sanity, the facts, symptoms, and circumstances on which he bases his opinion of such person's sanity or insanity, in order that the court may have an opportunity of measuring his qualifications as an expert witness, and the jury may have the benefit of it in passing upon the weight to be given his testimony.[60] But in such case the witness is not required to relate all the details upon which his opinion is based, since the opinion is frequently based, to a large extent, upon looks, gestures, peculiarities of speech, and mannerisms which it would be impossible of describing fully,[61] and to require their description in full would deprive the jury of the benefit of the opinion.

But it has been held that failure to require such witness to relate the facts and circumstances upon which he bases his opinion will not be such an error as will call for a reversal of the case.[62] In some states it seems to be held that it is not necessary for such witness to preface his opinion by stating the facts up-

[59] Prentis v. Bates, 88 Mich. 567, 50 N. W. 637; Townsend v. Pepperell, 99 Mass. 40.

[60] People v. Youngs, 151 N. Y. 210, 45 N. E. 460; Wheelock v. Godfrey, 100 Cal. 578, 35 P. 317; Puryear v. Reese, 6 Cold. (Tenn.) 21; Gibson v. Gibson, 9 Yerg. (Tenn.) 329; Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58; White v. Bailey, 10 Mich. 155; Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106; Kempsey v. McGinniss, 21 Mich. 123; Clark v. State, 12 Ohio, 438, 40 Am. Dec. 481; Stackhouse v. Horton, 15 N. J. Eq. 202.

[61] State v. Lewis, 20 Nev. 333, 22 P. 241.

[62] People v. Youngs, 151 N. Y. 210, 45 N. E. 460; Crockett v. Davis, 81 Md. 134, 31 A. 710.

on which it is based,[63] while others hold to the contrary view.[64] Some of the courts have gone to the extent of holding that such an opinion is of no value, without the facts upon which it is predicated being stated,[65] and that the facts which form the basis for the opinion are in fact the most important part of the testimony.[66] In such case, where the reasons for the opinion are absurd, or not well founded, the opinion will be disregarded;[67] and it will have little weight where the opinion is largely theory and speculation.[68] We think, however, that these rules are local, and the general rule is as stated first above.

§ 576. Weight

The class of expert opinion evidence in insanity cases, where the opinion is founded on what the witness himself has observed, is regarded in a majority of the courts as being of the most reliable type, especially where the witness, from long and intimate association with the alleged non compos, has had special opportunity of observing him, as in the case of a family physician of long standing. The courts have repeatedly held that the opinion of such a witness is entitled to more weight than that of an expert witness who has not had the same opportunity of observation, and who bases his opinion on a more or less hasty examination, or on facts developed during the trial. For this reason, it is proper to show such facts as a basis for the opinion, or to develop it on cross-examination, to the end that the opinion may be given its proper weight.[69]

[63] Lodge v. Lodge's Will, 2 Houst. (Del.) 418; Jones v. Collins, 94 Md. 403, 51 A. 398; 7 Prob. Rep. Ann. 435; Crockett v. Davis, 81 Md. 134, 31 A. 710.

[64] Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106; Gibson v. Gibson, 9 Yerg. (Tenn.) 329.

[65] First Nat. Bank of Easton v. Wirebach's Ex'r, 106 Pa. 37.

[66] Pinsep v. Dyce Sombre, 10 Moore, P. C. 232.

[67] Crockett v. Davis, 81 Md. 134, 31 A. 710.

[68] State v. Hockett, 70 Iowa, 442, 30 N. W. 742.

[69] Harrison v. Rowan, Fed. Cas. No. 6,141, 3 Wash. C. C. 580; In re Blakely, 48 Wis. 294, 4 N. W. 337; Kirkwood v. Gordon, 7 Rich

§ 577. Evidence on trial as basis

It is evident that an expert opinion founded on a personal examination and observation is only possible where the witness has been given the opportunity of personal contact with the alleged non compos. This is not always possible. It is frequently the case that the witness has never known the alleged insane person at any time before the trial at which he is called to testify, and has never been allowed the opportunity of examining the subject. This is especially true where the witness has been called by the parties adverse to the alleged insane person. Moreover, the complex condition of modern urban life, where there is very little personal contact, makes it increasingly difficult to find physicians having sufficient previous acquaintance with an alleged non compos to qualify them as experts from that standpoint. For these reasons, expert opinion evidence, based on the facts offered at the trial, has been coming into increasing use during the last few years.

§ 578. An apparent exception

An apparent exception to the rule that an opinion by an expert witness cannot be based on the statements of others is the rule which allows an expert to qualify himself to give an expert opinion as to the subject's mental condition by listening to the evidence offered on the trial. In this connection, it is the general rule in the states of the American Union that an expert, who has heard all the evidence in a case involving a person's sanity, there being no material conflict in the same, may be asked whether the facts shown by such evidence indicate the person to be sane or insane.[70] This may be done, though the witness has never seen

(S. C.) 474, 62 Am. Dec. 418; Whepley v. Loder, 1 Dem. Sur. (N. Y.) 368; Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072; Reed v. State, 62 Miss. 405.

[70] Leache v. State, 22 Tex. App. 279, 3 S. W. 541, 58 Am. Rep. 638; State v. Hayden, 51 Vt. 296; State v. Windsor, 5 Har. (Del.) 512; Negro Jerry v. Townshend, 9 Md. 145; Schneider v. Manning, 121

the alleged insane person,[71] and has never made an actual examination of such person, and knows nothing of the facts, except what he has learned from such evidence.[72]

§ 579. Based wholly on evidence

But the opinion of the witness must be based wholly upon the evidence introduced at such trial, and where it appears, on cross-examination or otherwise, that such opinion was formed in part from information obtained from other sources, as, for example, the reports of such cases in the newspapers, the opinion will be excluded.[73] The reason for the rule is that such opinion would be founded in part upon hearsay evidence, and all the facts upon which it is predicated would not be before the jury to aid them in passing upon the weight to be given the opinion. It will be kept in mind that the office of the expert witness is to aid the jury in passing on facts before them, by giving them the benefit of his superior scientific knowledge, acquired through research and experience, and to do this he must have the same facts before him that the jury will be called upon to consider in that connection.

Ill. 376, 12 N. E. 267; State v. Potts, 100 N. C. 457, 6 S. E. 657; McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; Yardley v. Cuthbertson, 108 Pa. 395, 1 A. 765, 56 Am. Rep. 218; Commonwealth v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; People v. Barber, 115 N. Y. 475, 22 N. E. 182; People v. Kleim, 1 Edm. Sel. Cas. (N. Y.) 13.

[71] State v. Windsor, 5 Har. (Del.) 512.

[72] Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; Vance v. Upson, 66 Tex. 476, 1 S. W. 179; Schneider v. Manning, 121 Ill. 376, 12 N. E. 271.

[73] Williams v. State, 37 Tex. Cr. R. 353, 39 S. W. 691; McFarland's Trial, 8 Abb. Prac. N. S. (N. Y.) 57; Whart. Cr. Ev. § 418.

§ 580. Based on whole of evidence

The rule also required that the opinion of such witness be based upon the evidence as a whole, and, where the witness has heard only a portion of the evidence, as opinion by him based thereon is not admissible.[74] The reason for the rule is twofold. The purpose of such evidence is to aid the jury in passing upon the whole of the evidence, i. e., the facts in the case, and this he cannot do when he has heard but part of it; and the portion of the evidence such witness has actually heard may have been but one side or phase of the matter, and the portion of the evidence which he did not hear may have explained and modified the portion he has actually heard, or even show a different state of facts.

While this is the general rule, it is not accepted in some of the states, where it is held that the witness may be allowed to designate a certain portion of the testimony, or the testimony of a particular witness, and express an opinion based thereon as to whether the alleged non compos is sane or insane.[75]

§ 581. Based on unconflicting evidence

The rule allowing an expert witness to base an opinion of a person's sanity on evidence he has heard during the trial applies only when there is no material conflict in such evidence, as indicated supra.[76] Where the evidence is conflicting, the witness

[74] People v. Lake, 12 N. Y. 358, 1 Park. Cr. Rep. 495; Webb v. State, 9 Tex. App. 491; Brown v. Com. 14 Bush (Ky.) 398; Parrish v. State, 139 Ala. 43, 36 So. 1020; Schneider v. Manning, 121 Ill. 387, 12 N. E. 271.

[75] State v. Gould, 40 Kan. 258, 19 P. 739; Yardley v. Cuthbertson, 108 Pa. 395, 1 A. 765, 56 Am. Rep. 218; Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 A. 253.

[76] Coyle v. Com., 104 Pa. 117; U. S. v. McGlue, Fed. Cas. No. 15,679, 1 Curt. 1; State v. Maier, 36 W. Va. 757, 15 S. E. 991; Dexter v. Hall, 15 Wall. (82 U. S.) 19, 21 L. Ed. 73; Tingley v. Cowgill, 48 Mo. 291; Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458.

is confronted with two or more sets of facts, and he must of necessity select one, to his mind the most tenable, upon which to base his opinion. For example, one side may present facts tending to show, if taken by themselves, an advanced state of mental derangement, while the other side may present facts going to show a clear and sane mind. If the witness is asked to give his opinion upon such a state of facts, he must, of course, decide which statement is correct, since he cannot give an opinion based upon both, they being contradictory. Therefore the witness will be placed in the stead of the jury, and will be called upon to weigh and pass upon the evidence for them. For the same reason, the witness will not be allowed to determine what the facts are, and give an opinion based thereon.[77]

Owing to the supposed difficulty of a witness predicating an opinion upon the evidence he has heard upon the trial of a case, it is held in some of the states that an expert witness cannot give an opinion, based generally upon the evidence he has heard, but must designate the facts upon which his opinion is based, or must give his opinion in response to a hypothetical question, in which certain facts in evidence are designated. This, it is held, unables the jury to weigh the evidence upon which the opinion is based, and by that means measure the weight to be given the evidence.[78]

[77] Dexter v. Hall, 82 U. S. (15 Wall.) 9, 21 L. Ed. 73. See supra, note 76.

[78] McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682; Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26; State v. Coleman, 20 S. C. 441; Bainbridge v. Bainbridge, 4 Cox, C. C. 454; Price v. Richmond & D. R. Co., 38 S. C. 199, 17 S. E. 732; Woodbury v. Obear, 7 Gray (Mass.) 467; Reg. v. Frances, 4 Cox, C. C. 57; People v. Lake, 12 N. Y. 358; McCarty v. Com., 20 S. W. 229, 14 Ky. Law Rep. 285.

§ 582. Exempted from operation of "rule"

Because they could not otherwise hear the evidence and qualify themselves to give an opinion upon the same, an expert witness in an insanity case will ordinarily be exempted from the effect of the "rule" invoked as to witnesses in such case,[79] although it has been held not to be error to put such a witness under the rule, where the testimony can be covered by a hypothetical question.[80] Neither does the rule exempting expert witnesses from the effect of the "rule" apply to expert witnesses who are to give opinions upon what they themselves have observed, and not on the testimony. There being no actual necessity for such a witness to hear the testimony of the other witnesses, he may be excluded by invoking the "rule."[81] But the whole matter is largely within the discretion of the trial court, and the exercise of such discretion will not be interfered with, except in case of abuse.[82]

§ 583. Examination by hypothetical questions

There are relatively few cases in which the evidence is without material conflict, and for that reason it is not practicable to secure an opinion from an expert witness, based on his knowledge of all the evidence. While, in some jurisdictions, such witness is allowed to group the facts he has heard in the course of the trial, and give an opinion based thereon, the general rule is not in accord with this practice. The best practice in such cases is to allow each side to present their respective theories of what the evidence shows to the witness in the form of a hypothetical question, and to ask him to give his opinion of the subject's sanity, taking the facts stated in the question as true for the purpose of

[79] Leache v. State, 22 Tex. App. 306, 3 S. W. 541, 58 Am. Rep. 640.
[80] Leache v. State, 22 Tex. App. 306, 3 S. W. 541, 58 Am. Rep. 638.
[81] Johnson v. State, 10 Tex. App. 571.
[82] Kennedy v. State, 19 Tex. App. 620.

the question.[83] By this procedure, each side has the facts they have proven elucidated by the opinion of the learned witness, but it is left for the jury to decide which state of facts is more likely correct. This constitutes the third means by which the opinion of an expert witness may be secured, and its use in insanity cases in increasing.

§ 584. Form and nature of

A hypothetical question in an insanity case consists of the grouping of the facts brought out in the evidence in the form of a given set of facts, which are assumed to be true for the purpose of the question, and requesting the witness to give an opinion as to whether such facts, if true, show the subject to be sane or insane. It is now well established that experts on the mental phenomena may give their opinion in response to such a question.[84] The assumed state of facts must be based upon the evidence actually introduced upon the trial of the case,[85] not on statements made to him out of court [86] or information he might have obtained from other sources, such as newspaper articles,[87] and it is the intention of the law to have such question based upon the whole of the evidence.[88] In some of the jurisdictions

[83] Johnson v. State, 10 Tex. App. 571; Tingley v. Cowgill, 48 Mo. 291; Coyle v. Com., 104 Pa. 117; U. S. v. McGlue, Fed. Cas. No. 15,679, 1 Curt. 1; In re Snelling's Will, 136 N. Y. 515, 32 N. E. 1006; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[84] Pittard v. Foster, 12 Ill. App. 132; Lovelady v. State, 14 Tex. App. 545; Massie v. Com., 24 S. W. 611, 15 Ky. Law Rep. 562; Choice v. State, 31 Ga. 424; Pidcock v. Potter, 68 Pa. 342, 8 Am. Rep. 181; Hathaway's Adm'r v. National Life Ins. Co., 48 Vt. 336; In re Mason, 60 Hun, 46, 14 N. Y. S. 434; People v. Goldenson, 76 Cal. 328, 19 P. 161; Rogers, Expert Testimony, p. 65; Jones, Evidence, pars. 373, 374; Whart. Cr. Ev. 419; Buswell, Insanity, par. 263.

[85] In re Snelling's Will, 136 N. Y. 515, 32 N. E. 1006; Prather v. McClelland, 76 Tex. 574, 13 S. W. 543.

[86] Heald v. Thing, 45 Me. 392.

[87] Williams v. State, 37 Tex. Cr. R. 348, 39 S. W. 691.

[88] Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638.

this is actually required,[89] but from a practical standpoint it is a very difficult requirement to carry out, because the evidence is often long and more or less complex in its nature, and is very frequently conflicting, so that a question based upon the whole would necessarily be more or less contradictory. Hence, from the very necessity of the matter, each side is usually allowed to propound to the witness hypothetical questions based upon their theory of the evidence; the whole examination being largely under the direction of the trial judge.[90] This practice enables the jury to weigh the facts, as shown in the evidence before them, accept the theory they find to be supported by a preponderance of the evidence, and consider it in the light of the expert opinion given thereon. The rule and reason therefor is very lucidly stated by the New York court, in the case of Cowley v. People, as follows:

"The claim is that a hypothetical question may not be put to an expert witness, unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes, something for the time being. Each side, in the issue of facts, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury, and, so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice." [91] But, while the question may comprise any theory reasonably consistent with the evidence, the opinion given thereon is limited by such question, and cannot go

[89] Hathaway's Adm'r v. National Life Ins. Co., 48 Vt. 336; Webb v. State, 9 Tex. App. 490; In re Miller, 26 Pittsb. Leg. J. (N. S. Pa.) 428.

[90] Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1000, 39 L. R. A. 305, 330; Coyle v. Com., 104 Pa. 117; Leache v. State, 22 Tex. App. 279, 3 S. W. 539, 58 Am. Rep. 638; In re King's Will, 29 Misc. Rep. 268, 61 N. Y. S. 238; Swygart v. Willard, 166 Ind. 25, 76 N. E. 755; Murphy v. Marston Coal Co., 183 Mass. 385, 67 N. E. 342.

[91] Cowley v. People, 83 N. Y. 470, 38 Am. Rep. 464.

beyond the scope of the facts contained in the question. Hence an expert witness cannot be asked questions which call for conclusions based on facts not stated in the questions.[92]

§ 585. Purpose and office of hypothetical question

In framing a hypothetical question, its purposes and office must be kept in mind. When the evidence is intricate or conflicting in its character, it is often necessary to dissect the same and scrutinize the segments in the light of scientific learning. It is here that the good offices of the expert witness are called in. Certain facts shown in the evidence are grouped into the form of a supposed case, and the witness is asked to test the same by what science teaches on the subject, and to say what light the facts contained in the hypothetical question throw on the subject's mental condition, assuming them to be true. Another group of facts may then be presented to the learned witness for his opinion, and yet another, until the jury have viewed every phase of the evidence through the eyes, as it were, of the learned witness; that is, have viewed it in the light of modern science. Of course, where the evidence is not conflicting, and is sufficiently simple to permit it, all of such evidence may be combined into one hypothetical question. But, in any event, the facts, or purported facts, should be repeated in the hypothetical question, and the witness should only be asked for an opinion based on what he had remembered of the evidence while he was present at the trial; otherwise, it would be but another way of asking him to give an opinion based on the evidence he had heard, and the jury would have no means of knowing just what facts the opinion is based on, since the witness might have heard but a portion of the evidence.[93] Each side has the right to present such questions to the witness in turn, and it should be the purpose of the propounder to so frame his question as to require

[92] Van Deusen v. Newcomer, 40 Mich. 90.

[93] People v. McElvaine, 121 N. Y. 250, 24 N. E. 465, 18 Am. St. Rep. 820.

the witness to state the measure of the mental capacity of the non compos in the witness' own language, and by ordinary terms and forms of expression, such as will best convey his ideas.[94] It should not extend over such a wide field of inquiry as will tend to confuse and mislead the minds of the jury.[95] It has been held in this connection that the better practice, in examining an expert witness, is to ask such witness to state what the symptoms of insanity are, and then to take particular facts brought out in the evidence, and ask whether such facts, assuming them to be true, indicate that the person in question is sane or insane.[96]

§ 586. Requisites of hypothetical question, in general

In framing the hypothetical question, three main requisites should be kept in mind, viz.: It must be based upon the evidence as introduced in the case; it must make clear to the jury just what portion of the evidence it is founded on; and it should clearly appear that the state of facts presented in the hypothetical question are only assumed to be true to enable the witness to give an opinion, and that their final determination and actual existence are for the jury.

§ 587. Basis for hypothetical question, in general

The hypothetical question should be so framed as to fairly reflect the facts established during the trial.[97] The question in theory, at least, is but a repetition of the evidence, put in more concrete form for presentation to the witness; and if it is so

[94] Hall v. Perry, 87 Me. 569, 33 A. 160, 47 Am. St. Rep. 352; Fairchild v. Bascomb, 35 Vt. 398.

[95] Dejarnette v. Com., 75 Va. 867.

[96] Ray v. Frances, 4 Cox, C. C. 57; Pannell v. Com., 86 Pa. 260.

[97] Burgo v. State, 26 Neb. 639, 42 N. W. 701; Prather v. McClelland, 76 Tex. 574, 13 S. W. 543; Hovey v. Chase, 52 Me. 305, 83 Am. Dec. 514; State v. Hanley, 34 Minn. 430, 26 N. W. 397; Meeker v. Meeker, 74 Iowa, 352, 37 N. W. 773, 7 Am. St. Rep. 489; Ballard v State, 19 Neb. 610, 28 N. W. 271; People v. Smiler, 125 N. Y. 717, 26 N. E. 312; Safe Deposit & Trust Co. of Baltimore v. Berry, 93 Md. 560, 49 A. 401.

worded that the true state of facts is not presented to the witness, of course, any opinion he may give will be formed upon a false premise, and will be worthless as an aid to the jury in interpreting the real facts. There is, also, the additional danger that it might draw the minds of the jury from the true facts, if a skilled practitioner should be allowed to get unreasonable inferences and unwarranted facts before them, merely by including such facts and inferences in a hypothetical question propounded to an expert witness in the case. For example, it has been held in this connection that a hypothetical question is objectionable, where it assumes that, when the alleged non compos said he had a sister, and that he would visit her if he knew where she lived, he referred to a sister he knew to be dead, rather than a sister who was living, as the evidence did not show that fact, and it would be an unwarranted assumption to assume that such was the case.[98]

§ 588. Based on actual evidence

For much the same reason, a hypothetical question is objectionable where it is so worded that it fails to present the facts in their true light. While a hypothetical question, as we have seen supra,[99] is not necessarily inadmissible because it contains but a part of the evidence, yet where, by reason of the omission of part of the facts, the facts presented in the question are caused to appear otherwise than in their just and true relation, and where so much of the evidence is omitted as to cause the facts actually submitted in the question to appear in the light that is untrue and unjust, the question should be excluded.[1] Similarly it is improper to include in such question things of which there is no actual proof, as conditions indicating insanity, or facts coexistent with insanity, as the hypothetical question should mirror the evidence, and such matters have no place in

[98] Carpenter v. Bailey, 94 Cal. 406, 29 P. 1101.

[99] See supra, § 585.

[1] Barber's Appeal, 63 Conn. 393, 27 A. 973, 22 L. R. A. 90.

the evidence;[2] nor should the framer of the question draw unwarranted conclusions for the evidence and use the same as a basis for such question.[3] The framing of such questions is very largely under the direction of the trial court, and his discretion in the matter is necessarily very large.

§ 589. Indicate evidence covered

In order for it to be of much assistance to the jury, it is obviously necessary that a hypothetical question should be framed so as to show on what portion of the evidence in the case it is founded, and for this reason such a question should not be confused or rambling in its nature, but should be clearly stated, so that the jury, as men of ordinary intelligence, can tell with certainty and precision upon what state of facts or group of facts the witness bases his opinion.[4] Neither should the question be so vague or indefinite in its form that the jury is left in doubt as to just what evidence, or state of facts founded on the evidence, the witness had in mind at the time he formed the opinion.[5] The endeavor, in such case, should be to identify the portion of the evidence upon which the hypothetical question is being based, as nearly as may be.

[2] Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882; Guetig v. State, 66 Ind. 95, 32 Am. Rep. 99; Muldowney v. Illinois Cent. R. Co., 39 Iowa, 615; State v. Stokely, 16 Minn. 282 (Gil. 249).

[3] Bomgardner v. Andrews, 55 Iowa, 638, 8 N. W. 481.

[4] McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682. See and read Barber's Appeal, 63 Conn. 393, 27 A. 973, 22 L. R. A. 90.

[5] State v. Scott, 41 Minn. 365, 43 N. W. 62.

§ 590. Assumed true for question

Whether the facts set out in a hypothetical question propounded to an expert witness in an insanity case are true is a question for the jury to decide.[6] They are merely assumed to be true for the purpose of the opinion only. In fact, it has been held that an opinion given in answer to such a question is not evidence until the jury finds that the facts upon which the question is predicated have been proven.[7] Therefore, where a hypothetical question is so framed as to lead the jury to believe that the facts stated therein are actually considered as proven, and not merely assumed to be true for the purpose of securing the opinion, the question is manifestly improper.[8] This vice in the hypothetical question usually appears where the propounder attempts to include in his question inferences and conditions drawn from the facts actually in evidence,[9] and for this reason it is the better practice to avoid such inferences, etc., in framing the question.

§ 591. Office of jury in passing on facts

But so long as the hypothetical question finds any support in the evidence, the mere meagerness of the facts upon which it is predicated will not render it incompetent, as that goes to its weight only, and is a question for the jury.[10] Where, however, the question has no support in the evidence, it should be disregarded,[11] and, when it is likely the jury will not do this without

[6] Barber's Appeal, 63 Conn. 393, 27 A. 973, 22 L. R. A. 90; Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[7] Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 A. 253; Kempsey v. McGinniss, 21 Mich. 123; Harrison v. Rowan, Fed. Cas. No. 6141, 3 Wash. C. C. 580.

[8] Guetig v. State, 66 Ind. 94, 32 Am. Rep. 99.

[9] People v. Barber, 115 N. Y. 475, 22 N. E. 182; Morrison v. Macilim, Scotch Sess. Cas. 625; Van Deusen v. Newcomer, 40 Mich. 90.

[10] Lake v. People, 1 Parker, Cr. R. 495; In re Fenton's Will, 97 Iowa, 192, 66 N. W. 99.

[11] State v. Pagels, 92 Mo. 300, 4 S. W. 931; Hovey v. Chase, 52 Me. 305, 83 Am. Dec. 514.

instruction, such jury should be instructed, on the suggestion of the opposing party, to do so. Moreover, in framing the question, none of the history of the case of which evidence has been given should be excluded, on the ground that it does not bear on the matter of insanity, as that is for the jury to say.[12] The fact that such question refers to the alleged non compos by name does not render it objectionable, as the jury usually understands who is being referred to, whether his name is mentioned or not.[13] Where it is likely that the jury may take the facts stated in the hypothetical question as admitted or proven, the jury should be specially instructed, on the suggestion of the opposing party, that the truth of the facts set out in such question is not to be taken for granted, but that the evidence should be scrutinized, and their truth determined.[14] But it has been held, in this connection, that it is not proper to instruct the jury that such opinion rests wholly upon the hypothetical question, and that the evidence upon which the question rests must be found to be true before any weight can be given the answer to the question, since the answer may rest upon other grounds than the truth of the facts stated in the question, and the weight to be given the answer is for the jury.[15]

§ 592. Examination of expert by opposition

While an expert witness in an insanity case is usually called by the side which expects to support its case by his opinion, he may become the witness of either side. In theory, he should be neutral, merely giving his opinion as an expert on the supposed cases presented him. For this reason, he may be examined by either side, each side presenting the facts in the case from their

[12] Prentis v. Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

[13] Grand Lodge, Independent Order of Mutual Aid, v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

[14] Grand Lodge, Independent Order of Mutual Aid, v. Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

[15] Guiteau's Case, 10 F. 161.

viewpoint. The practice is well stated in the Burt Case,[16] quoting from an earlier case:

"Where the expert has not heard the evidence, each side has the right to an opinion from the witness upon any hypothesis reasonably consistent with the evidence, and, if meagerly presented in the examination of one side, it may be fully presented by the other; the whole examination being within the control of the court, whose duty it is to see that it is fairly and reasonably conducted."

§ 593. Cross-examination of expert

The cross-examination of an expert witness, testifying in an insanity case, is necessarily largely under the control of the trial court, and the extent to which it may be carried lies largely within his sound discretion, keeping always in mind the purpose of such cross-examination. In order to allow either side to thoroughly test the expert witness offered by the other, a very large degree of latitude is allowed the cross-examiner. It has been held that such a witness may be cross-examined on purely abstract questions, and supposed facts and theories having no foundation in the evidence, and that, while the admission of testimony so elicited cannot be demanded as a matter of right, the action of the trial court in admitting the same, where it has fairly exercised its discretion, will not be reviewed.[17] However, the rule has been stated in other jurisdictions to the effect that an expert witness, testifying in an insanity case, cannot, on cross-examination, be asked hypothetical questions wholly without support in the evidence.[18] It would seem that the better rule would be to allow the cross-examination of such a witness upon

[16] Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1001, 39 L. R. A. 305.

[17] Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072; People v. Augsbury, 97 N. Y. 501; Williams v. Great Northern Ry. Co., 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199.

[18] Kearney v. State, 68 Miss. 233, 8 So. 292; State v. Hanley, 34 Minn. 430, 26 N. W. 397; Prather v. McClelland, 76 Tex. 574, 13 S. W. 543.

a wide range of subjects, where the purpose of such cross-examination is to test his accuracy, learning, and credibility;[19] but, where his opinion is sought with reference to a person's sanity, the question should be confined to the evidence.[20] As bearing upon his credibility and the accuracy of his statements, it may be shown on cross-examination that an expert witness has made statements contradictory to his testimony given upon the trial.[21] As bearing upon the weight to be given his testimony and the accuracy of his statements, an expert witness may be questioned upon cross-examination as to the circumstances under which the witness obtained the information upon which his testimony is predicated, as, for instance, that he secured it by obtaining entrance to the insane person's house by unfair means,[22] although it has been held that he may not be asked why and for what purpose he made an examination upon which he bases an opinion.[23] He may be further questioned as to the probable effect of injury or distress upon the mind of the alleged non compos,[24] whether or not given facts indicate insanity,[25] and may be questioned as to the degree of insanity, where he testified that in his opinion a person is insane, for instance, whether the person in question knew right from wrong.[26] As we have seen supra, an expert witness, who has testified in an insanity case, may be tested on cross-examination by hypothetical questions, and in this connection it would seem that, where further light can be thrown on the subject, the witness may be re-examined by the same method, provided the hypothetical questions propounded to him upon

19 People v. Sutton, 73 Cal. 243, 15 P. 86.

20 See supra, § 591.

21 Montgomery v. Com., 88 Ky. 509, 11 S. W. 475; People v. Youngs, 151 N. Y. 210, 45 N. E. 460.

22 Matter of Mason, 60 Hun, 48, 14 N. Y. S. 434; People v. Hoch, 150 N. Y. 291, 44 N. E. 976.

23 Hall v. Com. (Pa.) 12 A. 163.

24 Lord v. Beard, 79 N. C. 5; State v. Reddick, 7 Kan. 143.

25 People v. Lake, 12 N. Y. 358; People v. Sutton, 73 Cal. 243, 15 P. 86.

26 Clark v. State, 12 Ohio, 483, 40 Am. Dec. 481.

such re-examination do not repeat or include the hypothesis already stated upon direct and cross examination.[27]

§ 594. Inquiry as to skill, etc., of expert

As the expert witness is only called to the witness stand because of his supposed superior learning along the lines of the subject under investigation, it necessarily follows that the weight to be given to his testimony will depend largely upon his professional character and integrity, his skill and standing in his chosen profession, and the scope and extent of his investigation in such sphere. It is therefore competent, upon cross-examination of an expert witness testifying in an insanity case, to inquire fully into the witness' former course of study, his professional position, his means of information, and other facts tending to throw light on the means and extent of the witness' knowledge.[28] At the same time, the bias or prejudice of the witness may be brought out, as tending to aid the jury in weighing his testimony.[29]

The learning of the expert witness may be tested by comparison with standard medical books and journals on the subject of insanity. This may be done on cross-examination, by allowing the witness to read from such books and journals, and questioning him as to whether he agreed with the author on the subject in question, and why he did not agree with such author.[30] As much of our scientific knowledge is gleaned from the writings of others regarded by the learned profession as standard

[27] McGinnis v. Kempsey, 27 Mich. 363.

[28] Clark v. Fisher, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; Jamison v. Jamison's Will, 3 Houst. (Del.) 108; People v. Lake, 2 Parker, Cr. R. 215; Gay v. Union Mut. Life Ins. Co., Fed. Cas. No. 5282, 9 Blatchf. 142; People v. Kemmler, 119 N. Y. 580, 24 N. E. 9; Van Horn v. Keenan, 28 Ill. 448.

[29] Rush v. Megee, 36 Ind. 69; Clark v. Fisher, 1 Paige (N. Y.) 171, 19 Am. Dec. 402.

[30] State v. Winter, 72 Iowa, 627, 34 N. W. 475; State v. Coleman, 20 S. C. 441; Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1001, 39 L. R. A. 305.

authorities, the learning and extent of a witness' information may be measured by comparison with the ideas of recognized writers on the subject. But it has been held that such books and journals cannot be introduced in evidence to contradict a witness.[31] However, it has been held that the cross-examiner may use such medical works to aid him in framing proper questions to be put to the expert witness on cross-examination.[32]

§ 595. Nonexpert testimony, in general

Not only are persons specially learned in the mental phenomena allowed to aid the jury with conclusions drawn from their knowledge of facts in the case, but under certain circumstances persons having no special scientific knowledge, but who, from their association with or observation of the alleged non compos, have special opportunity of becoming acquainted with his mental condition, are allowed to give their opinion with reference thereto. Such are known as nonexpert witnesses, and their opinions are known as nonexpert opinions. This, like the testimony of the expert witness, furnishes an exception to the general rule that a witness cannot testify to conclusions drawn from facts in a case, and rests upon the necessity of the case. At best, our knowledge of another's state of mind is very vague, compared to our knowledge of physical facts about us. We cannot acquaint ourselves with it by the ordinary senses of perception, touch, sight, etc., but can only reach a knowledge of it by reasoning from other known facts. For example, from the acts, speech, mannerisms, and general appearance we draw conclusions of the mental state of the subject, as reflected in such acts, speech, mannerisms, etc. It is often impracticable, if not impossible, to sufficiently describe the exact grounds for such conclusions, or the logical deductions which may lead us to a conclusion that a certain mental state exists with reference to the subject; e. g., that he is insane. As we often know that a person is happy or

[31] In re Macfarland's Trial (N. Y.) 8 Abb. Prac. (N. S.) 57.
[32] State v. Coleman, 20 S. C. 441.

grieved merely from association, and noting his appearance and manner during such association, so the ordinary person may acquire valuable knowledge of another's mental state in much the same way. It is important that this knowledge be conveyed to the court and jury, and, since it is impracticable to do so by relating the facts, the witness is allowed to give the conclusions drawn from the facts. In fact, by some authorities, such statement by a nonexpert witness is not considered as a conclusion, but is considered in the light of a statement of facts within the witness' knowledge, and analogous to testimony as to personal identity, handwriting, a state of intoxication, fact of a person being asleep, etc.[33]

§ 596. Distinction between expert and nonexpert witness

It has been suggested that the distinction between nonexpert and expert testimony is the distinction between given evidence of facts open to ordinary observation and the process of logical and intellectual reasoning from known facts. The witness of the first class mentioned, whether a family physician or ordinary acquaintance, relative, or friend, details facts and circumstances coming under his observation, and concludes by indicating the impression made upon the witness' mind by the physical facts coming to his knowledge as indicative of the subject's sanity. The expert witness, on the other hand, takes the given hypothesis as shown by the evidence, etc., and in the light of his knowledge, not of the particular facts, but of general rules governing like conditions, deduces certain results with reference to the subject's mental condition. The line of demarkation between nonexpert and expert testimony is the question of whether such testimony is a statement of knowledge which has come to him through the

[33] Buswell on Insanity, § 242; De Witt v. Barly, 17 N. Y. 340, 348; Smith v. Hickenbottom, 57 Iowa, 733–736, 11 N. W. 664; Holland v. Zollner, 102 Cal. 633, 639, 36 P. 930, 37 P. 231; Wright v. Com., 72 S. W. 340, 24 Ky. Law Rep. 1838; Garrison v. Blanton, 48 Tex. 299; Hempton v. State, 111 Wis. 127, 86 N. W. 596.

agency of his own senses, or is a conclusion of the witness reached by logical deduction through rules recognized by science as governing like conditions to those surrounding the alleged non compos. Where the expert witness is testifying from examination and observation of the subject, this distinction is not so apparent, even though the fact that the witness is deducing conclusions, by applying the rules of science to given facts, received through the witness' own senses of observation, remains true. The distinction is practical only, since it is required to distinguish nonexpert from expert testimony, where they shade into one another, and different rules of law may govern their admission. For example, a physician, who testifies from knowledge acquired from observation of and association with the non compos, may not qualify as an expert, but may yet testify as a nonexpert witness; but in the latter case he must first relate the facts upon which his opinion is founded.[34]

§ 597. Qualification of nonexpert

A nonexpert witness, or nonprofessional witness, as he is sometimes called, is, in the sense here used, one who, by association with and observation of the alleged non compos, has become acquainted with his mental condition sufficiently to express a definite opinion with reference thereto. Just what amount of knowledge and acquaintance is necessary to qualify such a witness is largely governed by the facts of each case, and within the sound discretion of the trial judge, who may declare the witness incompetent where the preliminary examination shows the facts are insufficient to qualify the witness to express an opinion.[35] But where such witness shows any reasonable opportunity to acquire knowledge of the subject's sanity through observation and association, and is able to state any facts upon which to predicate an opinion, the meagerness of such facts

[34] See ante, § 599.

[35] Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69; Hempton v. State, 111 Wis. 127, 86 N. W. 596.

goes rather to the weight to be given the opinion than to its admissibility; and the opinion formed at the time, with the facts upon which it is based, should go to the jury for what it is worth.[36] The weight to be given to such testimony is exclusively within the province of the jury,[37] if the facts upon which the opinion is founded themselves tend to show sanity or insanity.[38] The general rule, therefore, seems to be that, where one has observed the conduct and appearance of an alleged non compos during conversation and transactions with him, or that such intimate relations existed between the parties that the opportunity for observation is implied as in case of husband and wife, etc., the witness will be allowed to give his opinion of the person's sanity, provided he states the facts on which his opinion is in the main based.[39] This rule has not been followed in Maine, Massachusetts, and New York.[40] In New York, it seems, however, that such witness may give the impression the acts and conduct have made upon him, as to whether rational or irrational,[41] and

[36] Emery v. Hoyt, 46 Ill. 258; Goodwin v. State, 96 Ind. 550; Territory v. McNabb, 16 N. M. 635, 120 P. 910; Queenan v. Oklahoma, 190 U. S. 548, 23 S. Ct. 762, 47 L. Ed. 1175; Choice v. State, 31 Ga. 424; Sargent v. Burton, 74 Vt. 24, 52 A. 72; People v. Casey, 124 Mich. 279, 82 N. W. 883; Williams v. State, 37 Tex. Cr. R. 348, 39 S. W. 687; Ragland v. State, 125 Ala. 12, 27 So. 983.

[37] See note 36.

[38] Safe Deposit & Trust Co. of Baltimore v. Berry, 93 Md. 560, 49 A. 401; Brown v. Mitchell, 87 Tex. 140, 26 S. W. 1059.

[39] Green v. State, 64 Ark. 523, 43 S. W. 973; In re Keithley's Estate, 134 Cal. 9, 66 P. 5; Armstrong v. State, 30 Fla. 170, 11 So. 618, 17 L. R. A. 484; Grimshaw v. Kent, 67 Kan. 463, 73 P. 92; Ring v. Lawless, 190 Ill. 520, 60 N. E. 881; Haney v. Clark, 65 Tex. 93; Scalf v. Collins County, 80 Tex. 514, 16 S. W. 314; Com. v. Wireback, 190 Pa. 138, 42 A. 542, 70 Am. St. Rep. 625; In re Christiansen, 17 Utah, 412, 53 P. 1003, 41 L. R. A. 504, 70 Am. St. Rep. 794; Hilmer v. Western Travelers' Acc. Ass'n, 86 Neb. 285, 125 N. W. 535, 27 L. R. A. (N. S.) 319.

[40] Wyman v. Gould, 47 Me. 159; McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358; Bell v. McMaster, 29 Hun (N. Y.) 272; Wyse v. Wyse, 155 N. Y. 367, 49 N. E. 942.

[41] Wyse v. Wyse, 155 N. Y. 367, 49 N. E. 942.

this restriction of such testimony will not apply to attesting witnesses to wills, who may freely give their opinion of the testator's competency.[42] In some of the other states the rule is restricted, and the witness is not allowed to give his opinion as to the actual mental state; that is, he is not allowed to state whether he considers the subject to be sane or insane, but, after stating all he has seen as to acts, conduct, and appearance of the subject, as bearing upon his sanity, the witness is allowed to testify as to the impression made upon his mind as to such person's sanity.[43]

§ 598. Qualification—Question for court

The amount of observation, etc., necessary to qualify a witness is a matter which rests usually within the sound discretion of the trial judge, who passes upon the opportunities and facilities of the witness for observation, and on the force and relevance of the things observed, as tending to reflect the mental condition of the subject,[44] and if the witness does not show sufficient opportunity for observation, or the facts which he has observed are not sufficient of themselves to show insanity, he may refuse to allow the witness to testify.[45] It is usually held that the meagerness of the witness' observation, as well as his mental state and interest in the matter, usually goes to the weight of

[42] Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

[43] Queenan v. Territory, 11 Okl. 261, 71 P. 218, 61 L. R. A. 324; People v. Strait, 148 N. Y. 566, 42 N. E. 1045; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

[44] Kimberly's Appeal, 68 Conn. 428, 36 A. 847, 37 L. R. A. 261, 57 Am. St. Rep. 101; McLeod v. State, 31 Tex. Cr. R. 331, 20 S. W. 749; Stumph v. Miller, 142 Ind. 442, 41 N. E. 812; Armstrong v. State, 30 Fla. 171, 11 So. 618, 17 L. R. A. 484.

[45] Hawley v. Griffin (Iowa) 82 N. W. 905; Patten v. Cilley, 67 N. H. 520, 42 A. 47; O'Connor v. Madison, 98 Mich. 183, 57 N. W. 105; Collins v. People, 194 Ill. 506, 62 N. E. 902; In re Hull's Will, 117 Iowa, 738, 89 N. W. 979; Jones v. Collins, 94 Md. 403, 51 A. 398; Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

the opinion, rather than to its admissibility.[46] However, the opinion must be founded upon facts that the witness has himself observed, and not what has been told him by another,[47] and declarations and expressions of opinion out of court are considered as hearsay and inadmissible.[48]

§ 599. Manner of testifying

As indicated supra, a nonexpert witness is usually required to state the facts upon which he founds an opinion as a preliminary requisite to expressing the opinion.[49] The reason for this is given as twofold: It furnishes a means by which the trial judge can determine the witness' qualification as a nonexpert witness; and it enables the jury to pass upon the weight to be given the opinion.[50] Aside from the varying grades of intelligence in witnesses, the weight of a nonexpert opinion usually depends upon the opportunity of the witness for observation and contact with the subject, and this must be made known to the jury. While it is usual and proper to require the witness to state the facts upon which he bases opinion as a predicate for his opinion,[51] yet a failure to do so is not error, if such facts are subsequently stated, or are shown elsewhere.[52] In this connection, it is held that the nonexpert witness need not give the facts on which his opinion is based, when he testifies that the subject is

[46] Johnson v. Culver, 116 Ind. 278, 19 N. E. 129; Hawley v. Griffin (Iowa) 82 N. W. 905.

[47] 2 Bishop, Cr. Proc. § 678; First Nat. Bank of Navasota v. McGinty, 29 Tex. Civ. App. 539, 69 S. W. 495.

[48] Buswell on Insanity, § 240.

[49] See supra, § 597.

[50] Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. Ed. 536; Prentis v. Bates, 93 Mich. 234, 53 N. W. 153, 17 L. R. A. 494.

[51] Buswell on Insanity, § 241; Turner v. State, 61 Tex. Cr. R. 97, 133 S. W. 1053.

[52] Jones v. Galbraith (Tenn. Ch. App.) 59 S. W. 350; Garrison v. Blanton, 48 Tex. 299. See 38 L. R. A. 722, 723, and 36 L. R. A. 70.

sane.[53] Similarly it is held that witnesses who testify that they have seen nothing wrong with the alleged non compos,[54] or that they have observed nothing peculiar or unusual about the subject's appearance, speech, etc., which would lead them to conclude that he was insane, is but a statement of facts coming under the witnesses' observation, and need not be prefaced by statements of facts.

It has been said that such witness must state all the facts upon which he bases his opinion.[55] While this may be desirable, it is too severe a test; and it is generally held that the witness need only state the general and most striking facts, after which he may sum up the whole of the remembered and unremembered facts, by stating his impression in the form of an opinion.[56] This is the most logical rule, as the very purpose of opinion evidence is to give the court and jury the benefit of impressions which cannot be traced to specific sources or reduced to concrete facts. Just when the witness has stated sufficient facts as a predicate for his opinion is a question for the court.[57]

§ 600. Weight given nonexpert testimony

The courts have looked with considerable favor on this class of testimony, as being of a most reliable character, especially where the witness is brought in more or less intimate contact with the subject, and is able to view his conduct from day to day, as in cases of spouses, near relations, servants, etc. Especial value seems to be given to the testimony of family physicians, who have acquired more or less medical skill in their practice, and have become intimately acquainted with the subject over a pe-

53 State v. Soper, 148 Mo. 217, 49 S. W. 1010; State v. Holloway, 156 Mo. 222, 56 S. W. 734.

54 Taylor v. State, 49 Tex. Cr. R. 7, 90 S. W. 648.

55 Butler v. St. Louis Life Ins. Co., 45 Iowa, 93.

56 Queenan v. Oklahoma, 190 U. S. 549, 23 S. Ct. 762, 47 L. Ed. 1177; Mull v. Carr, 5 Ind. App. 491, 32 N. E. 591; Koppe v. Koppe, 57 Tex. Civ. App. 204, 122 S. W. 74.

57 Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69.

riod of time, but who have no special learning which will enable them to qualify as experts.[58] The general attitude of the courts is well summed up by the Supreme Court of Utah as follows: "The opinion of intimate acquaintances, who have been close observers of their [insane persons'] conduct, though not competent as experts, when they can instance acts indicating mental derangement, are often most reliable and more valuable than professional experts, who have not had the benefit of such intimate acquaintance." [59]

§ 601. Subscribing witness to will, as exception

A seeming exception to the rule which required that nonexpert witnesses state the facts upon which their opinion is in the main based is found in the rule allowing the subscribing witnesses to a will to give an opinion as to the mental condition of the testator at the time the will was signed, without relating the facts on which such opinion is based.[60] The reason is probably that such a witness is presumed to have satisfied himself of the sanity of the intestate, and to have certified to that fact by subscribing as a witness,[61] and rests on necessity. This rule has been followed, even in those states which do not ordinarily allow nonexpert testimony in insanity cases.[62] But, while not required

[58] Appeal of Dunham, 27 Conn. 192; Pigg v. State, 43 Tex. 108; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Pidcock v. Potter, 68 Pa. 342, 8 Am. Rep. 181; May v. Bradlee, 127 Mass. 414; State v. Meyers, 99 Mo. 107, 12 S. W. 516.

[59] In re Christiansen, 17 Utah, 412, 53 P. 1003, 41 L. R. A. 504, 70 Am. St. Rep. 794.

[60] Kaufman v. Caughman, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Kelly's Heirs v. McGuire, 15 Ark. 555; Garrison v. Blanton, 48 Tex. 299; Jones v. Collins, 94 Md. 403, 51 A. 398; Call v. Byram, 39 Ind. 499; Barber's Appeal, 63 Conn. 393, 27 A. 973, 22 L. R. A. 90.

[61] Needham v. Ide, 5 Pick. (Mass.) 510; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

[62] Hewlett v. Wood, 55 N. Y. 634; May v. Bradlee, 127 Mass. 414; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

as a basis for the opinion, the facts on which the witness bases his opinion may be brought out by either side as bearing on the weight to be given the opinion.[63] In some states the rule has been extended to include witnesses to the execution of deeds,[64] but this is denied in other jurisdictions.[65] But no special weight seems to attach to the testimony of subscribing witnesses over that of other witnesses,[66] and other witnesses who were present at the time the will was made, and are able to state the condition, appearance, etc., of the testator, are allowed to testify as to his mental condition in the same manner as the subscribing witnesses.[67] As a matter of course, the attesting witness to a codicil will not, as such, be competent to testify to the testator's sanity at the time he made the original will, as his inquiry into the testator's sanity will be presumed to have extended only to the time he witnessed the codicil.[68]

§ 602. Limitation to rule as to attesting witnesses

It has been held by some authorities that the rule which qualified the attesting witness to a will to give an opinion as to the testator's sanity will hold good only where the testimony of such witness tends to prove such testator's sanity. Otherwise, his having certified to such person's sanity, by attesting his will, will go for naught, and his action in denying it will be looked on as a breach of trust, and his testimony given little weight.[69] However, this is denied by other authorities, who hold that, while it may be improper for any person to witness a will who believes

63 Gibson v. Gibson, 9 Yerg. (Tenn.) 329; Cilley v. Cilley, 34 Me. 162; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

64 Lowe v. Jolliffe, 1 W. Bl. 365; Brand v. Brand, 39 How. Prac. (N. Y.) 193.

65 Dean v. Fuller, 40 Pa. 474.

66 Burney v. Torrey, 100 Ala. 157, 14 So. 685, 46 Am. St. Rep. 33.

67 Brown v. Mitchell, 75 Tex. 15, 12 S. W. 606.

68 Gass' Heirs v. Gass' Ex'rs, 3 Humph. (Tenn.) 278.

69 Kenworthy v. Williams, 5 Ind. 375; Dickinson v. Dickinson, 61 Pa. 401.

the testator is at the time incapable of making a will, still there is no rule of law barring him from giving his testimony, whatever it may be, whether for or against the validity of the will, merely because he was a witness to the will.[70] It would seem that this last is the more practical rule, and the fact that such witness signed the will as one of the attesting witnesses, in face of the fact that he thought the testator incapable of making it, will go to the weight rather than to the admissibility of the testimony.

§ 603. Non compos as witness, in general

As a general rule, total lack of mental capacity on the part of a proposed witness will render his testimony inadmissible.[71] This is true, whether the witness was insane at the time he was offered as a witness, or at the time of the transaction to be dealt with in the testimony of such witness.[72] There has been some attempt to draw a distinction between insanity at the time of the transaction testified about, and insanity at the time the witness is called upon to testify, and to hold that insanity in the first instance renders the witness incompetent to testify, while insanity in the latter case merely goes to the weight of the testimony;[73] but no good reason has been advanced for the distinction, and it is not generally recognized.[74] Insanity at any time between

[70] Stevens v. Leonard, 154 Ind. 67, 56 N. E. 27, 77 Am. St. Rep. 446.

[71] State v. Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423; People v. Wayman, 256 Ill. 151, 99 N. E. 941; Pease v. Burrowes, 86 Me. 153, 29 A. 1053, 1060; Holland v. Riggs, 53 Tex. Civ. App. 367, 116 S. W. 167; Abbott, Tri. Ev. p. 65; McKelvey, Ev. p. 290.

[72] See note 71, § 603, supra.

[73] Holcomb v. Holcomb, 28 Conn. 177; McKelvey, Ev. p. 291.

[74] State v. Hayward, 62 Minn. 474, 65 N. W. 63, 69; People v. Enright, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913E, 318; Batterton v. State, 52 Tex. Cr. R. 381, 107 S. W. 826; Lopez v. State, 30 Tex. App. 487, 17 S. W. 1060, 28 Am. St. Rep. 935; Worthington v. Mencer, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407; State v. Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423.

the transaction inquired about and the trial will not go to the competency of the witness, but will likely be admissible as going to the weight of the testimony, because of the likelihood of it continuing up to the time of the trial. However, it has been held that mere temporary insanity, or fits of mental derangement, occurring at other times, or even between the time of the transaction testified about and the trial, cannot be shown to affect the credibility of the witness.[75]

The reason for the exclusion of the testimony of an insane person is twofold, viz.: First, a person whose mind is too defective to remember facts and to relate them correctly is a detriment rather than an aid in arriving at the truth of the matter under inquiry; and, second, since such a person does not understand and appreciate the obligation of an oath, and is, by reason of his insane condition, exempted from judgment for perjury, there is no way to safeguard his testimony. It is therefore the general rule that an insane person is admissible as a witness only where he has sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue.[76] In this connection it is held that merely showing that one is a lunatic is not sufficient to warrant exclusion of testimony per se, but it must appear that the time of his examination that he is so far under the influence of his malady as to be deprived of that amount of understanding which is necessary to enable him to retain in memory the events of which he has been witness and give him knowledge of right and wrong. If at the time of his examination he has this share of understand-

[75] Phillips v. Short, 2 Har. (Del.) 339; Campbell v. State, 23 Ala. 44.

[76] Pittsburgh & W. R. Co. v. Thompson, 82 F. 720, 27 C. C. A. 333; Pease v. Burrowes, 86 Me. 153, 29 A. 1053; Hornbeck v. State, 35 Ohio St. 277, 35 Am. Rep. 608; State v. Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423; District of Columbia v. Arms, 107 U. S. 519, 2 S. Ct. 840, 27 L. Ed. 618, 619; Lopez v. State, 30 Tex. App. 487, 17 S. W. 1060, 28 Am. St. Rep. 935.

ing, he is competent to the extent that the evidence should go to the jury, who may determine the weight to be given it.[77]

§ 604. How competency determined

Whether a proposed witness has sufficient mental capacity to testify is a question for the trial judge to determine, and weight to be given the testimony is a question for the jury to pass on.[78] In proper cases, the alleged insanity of a witness may be made an issue in the case, and submitted to the jury, with appropriate instructions, along with the other issues in the case.[79] It has been held that, where evidence of a witness' insanity is introduced later in the case, the court may instruct the jury that, if they found the witness to be insane, they should disregard his testimony.[80] It has been held in this connection that the testimony of such a witness will not be received where uncorroborated. For example, it is held that the uncorroborated testimony of an idiot will not be sufficient as a basis for a conviction for crime;[81] nor may the declarations of an insane person be offered in evidence as a basis for conviction, even where such declarations would be competent in a sane person—e. g., the declarations of the victim of a criminal assault, made immediately after the crime.[82]

[77] Coleman v. Com., 25 Grat. (66 Va.) 865, 18 Am. Rep. 711; Singleton v. State, 57 Tex. Cr. R. 560, 124 S. W. 92; Pittsburgh & W. R. Co. v. Thompson, 82 F. 720, 27 C. C. A. 333; State v. Brown, 2 Marv. (Del.) 380, 36 A. 458; District of Columbia v. Arms, 107 U. S. 522, 2 S. Ct. 840, 27 L. Ed. 619; Pease v. Burrowes, 86 Me. 153, 29 A. 1053; Hornbeck v. State, 35 Ohio St. 277, 35 Am. Rep. 608; State v. Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423.

[78] See note 77, supra.

[79] Batterton v. State, 52 Tex. Cr. R. 381, 107 S. W. 826; Territory v. Padilla, 8 N. M. 520, 46 P. 348.

[80] Bowdle v. Detroit St. Ry. Co., 103 Mich. 277, 61 N. W. 529, 50 Am. St. Rep. 366.

[81] People v. Deschessere, 69 App. Div. 217, 74 N. Y. S. 761.

[82] Hornbeck v. State, 35 Ohio St. 277, 35 Am. Rep. 608; State v. Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423.

It is usual, where the insanity of the witness is suggested to the court, either by objection to his being used as a witness or otherwise, for the trial court to direct an examination of the witness upon his voir dire to determine whether his testimony should be allowed to go to the jury.[83] If not satisfied with the examination of the witness himself, the trial judge may examine the witness on the subject, or any other evidence which will tend to throw light on the proposed witness' mental condition.[84] It has been held that this duty is limited to the presiding judge, and will not extend to a notary taking deposition for use in the trial.[85] The proper practice in such case would be to object to the deposition upon its being offered at the trial, whereupon the presiding trial judge could pass upon the competency of the witness in the light of such evidence as the party making the objection saw fit to offer.

Every person being presumed to be sane and competent to testify, the burden rests upon the person making the objection to show the mental incompetency of the witness;[86] but an adjudication of insanity recent in time, or where the witness is confined to an asylum in consequence of it, will prima facie disqualify such witness to testify;[87] but where it is remote, or the witness is not under confinement as result of it, it will not be conclusive.[88]

[83] Batterton v. State, 52 Tex. Cr. R. 381, 107 S. W. 826; Elliott, Ev. § 752.

[84] State v. Michael, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605; Pease v. Burrowes, 86 Me. 153, 29 A. 1053; State v. Brown, 2 Marv. (Del.) 380, 36 A. 458; District of Columbia v. Arms, 107 U. S. 519, 2 S. Ct. 840, 27 L. Ed. 618; Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164.

[85] Carpenter v. Dame, 10 Ind. 125.

[86] State v. Langford, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277; State v. Brown, 2 Marv. (Del.) 380, 36 A. 458; People v. Tyree, 21 Cal. App. 706, 132 P. 786.

[87] Hoyt v. Adee, 3 Lans. (N. Y.) 173; Pittsburgh & W. Ry. Co. v. Thompson, 82 F. 720, 27 C. C. A. 333; City of Covington v. O'Meara, 133 Ky. 762, 119 S. W. 187.

[88] City of Covington v. O'Meara, 133 Ky. 762, 119 S. W. 187; Bark-

The court may of its own motion inquire into the competency of a witness, where his probable insanity is brought to the court's attention, under the duty which always rests upon the trial judge to safeguard the correctness of the facts under inquiry before it. An insane person may be a witness during a lucid interval; his competency being for the trial court to decide, when he is offered as a witness.[89] Where the sanity of a witness has been put in issue, the same evidence as is ordinarily offered on the issue of insanity may be employed in determining his mental condition, either on inquiry before the court to determine the competency of the witness, or on trial before the jury, where the alleged insanity is offered as bearing on the credibility of the witness. The witness himself may be examined with a view of testing his memory and capacity for coherent and intelligent thought with reference to the matter he proposes to testify about, but it has been held that the court has no power to require a witness, after he has concluded his testimony and left the stand, to return to the stand and submit to examination as bearing on his mental condition, as, for example, that he is affected with hysteria.[90] Also other witnesses, expert or nonexpert, may be called for that purpose subject to much the same rules that ordinarily govern such cases.[91] Where the court allows the witness to testify, the evidence of insanity should be submitted to the jury, to enable them to pass on the weight to be given such testimony.[92] While the foregoing is the rule which is supported by the weight

er v. Washburn, 200 N. Y. 280, 93 N. E. 958, 34 L. R. A. (N. S.) 159, 140 Am. St. Rep. 640.

[89] People ex rél. Norton v. New York Hospital, 3 Abb. N. C. (N. Y.) 229.

[90] Goodwin v. State, 114 Wis. 318, 90 N. W. 170.

[91] Holcomb v. Holcomb, 28 Conn. 177; Fairchild v. Bascomb, 35 Vt. 398; State v. Kelley, 57 N. H. 549; Alleman v. Stepp, 52 Iowa, 626, 3 N. W. 636, 35 Am. Rep. 288; Isler v. Dewey, 75 N. C. 466.

[92] Coleman v. Com., 25 Grat. (66 Va.) 865, 18 Am. Rep. 711; 1 Greenl. Ev. (13th Ed.) § 365; Whart. Cr. Ev. (8th Ed.) §§ 370–373; Bowdle v. Detroit St. Ry. Co., 103 Mich. 272, 61 N. W. 529, 50 Am. St. Rep. 366.

of authority, as well as sound reason, there are cases which hold that, where the trial judge has held the witness to be competent to testify, the jury may not notice the evidence of insanity of such witness in passing upon his testimony.[93] In this connection it has been held that evidence of a witness' incapacity may be offered to affect his credibility, even when his right to testify was not questioned at the time he was offered as a witness.[94] The same objections to the witness' sanity will hold, where he is testifying by deposition, as where he is testifying from the witness stand.[95] It is held to be improper to allow a witness testifying in an insanity case to testify to facts and circumstances tending to show his own insanity, especially where he is related to the subject, and his insanity would be inheritable by subject.[96]

It has been held that, where a party is not competent as a witness in his own behalf, he cannot be called as a witness by the opposite party to the suit, and an order of the court, even under the practice in nature of a bill of discovery, should not be made, allowing his examination by such opposing party.[97] Neither should ex parte depositions be allowed. The reason is obvious. A person too mentally incapable of testifying for himself should not be exposed to an examination by the opposite party, where his weak mentality would at most subject him to great disadvantage. Moreover, where such opposite party has once objected to him as a witness in his own behalf, it would be inconsistent to allow the opposite party to offer him as a witness under circumstances where such opponent would be impliedly affirming his competency.

93 Campbell v. State, 23 Ala. 44.

94 Bowdle v. Detroit St. Ry. Co., 103 Mich. 272, 61 N. W. 529, 50 Am. St. Rep. 366; Rivara v. Ghio, 3 E. D. Smith (N. Y.) 264.

95 Wren v. Howland, 33 Tex. Civ. App. 87, 75 S. W. 894.

96 Commonwealth v. Dale, 264 Pa. 362, 107 A. 743, 6 A. L. R. 1482.

97 Mason v. Libbey, 2 Abb. N. C. (N. Y.) 137.

§ 605. Means and scope of inquiry

As indicated supra, the trial judge may determine the mental capacity of a witness by any means competent to determine his mental condition, where the question has been regularly raised as an issue in the suit;[98] and the burden of showing the incompetency rests upon the person asserting it. However, the courts are inclined to hold that, where such witness has been regularly adjudged insane, he will be prima facie incompetent as a witness;[99] but such adjudication is not conclusive, and the witness' present competency may be inquired into and determined by the trial judge.[1]

It is said that the inquiry as to sanity or insanity should be specially directed to the matters to be dealt with in his testimony.[2] Persons may be insane as to one subject, and sane as to others, and the fact that the witness is mentally unsound on one or more subjects does not necessarily render him unworthy of belief in general, or prevent his giving correct testimony on other matters and narrating facts truly,[3] and the existence of such insanity will go to his credibility rather than to his competency as a witness.[4] Where the partial insanity is shown to be a total im-

[98] See supra, § 604.

[99] See 37 L. R. A. 426.

[1] People v. Enright, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913E, 318; Barker v. Washburn, 200 N. Y. 280, 93 N. E. 958, 34 L. R. A. (N. S.) 159, 140 Am. St. Rep. 640.

[2] People v. Enright, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913E, 318; State v. Simes, 12 Idaho, 310, 85 P. 914, 9 Ann. Cas. 1216.

[3] Pease v. Burrowes, 86 Me. 153, 29 A. 1053; People v. Enright, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913E, 318; Campbell v. State, 23 Ala. 44; Evans v. Hettich, 7 Wheat. 453, 5 L. Ed. 496; Bliss v. Beck, 80 Neb. 290, 114 N. W. 162, 16 Ann. Cas. 366; Reg. v. Hill, 5 Cox, C. C. 259.

[4] Coleman v. Com., 25 Grat. (Va.) 865, 18 Am. Rep. 711; Burns v. State, 145 Wis. 373, 128 N. W. 987, 140 Am. St. Rep. 1081; Evans v. Hettich, 7 Wheat. 453, 5 L. Ed. 496.

pairment with respect to the subject-matter of the litigation, the courts are inclined to hold the witness to be incompetent.[5]

As indicated, merely showing some form of insanity or mental derangement is not sufficient to exclude; but such matters merely go to the weight of the witness' testimony. For example, evidence that a person is not possessed of ordinary intelligence,[6] or was adjudged insane many years previously, will be insufficient to show his incapacity as a witness,[7] unless it is also shown that such mental disability is still continuing,[8] or he is incapable of taking care of his person or property, or is criminally irresponsible. Nor will evidence, subject to the ordinary objections of remoteness, such as not being the best evidence, etc., be admissible even to attack the credibility of the witness. For example, it may not be shown that the witness is generally reputed not to have ordinary intelligence,[9] such evidence being objectionable as hearsay, and evidence of proceeding to determine whether such witness is a proper subject for admission to a hospital for the insane,[10] and a certificate of the War Department to the effect that the person offered as a witness has been discharged from the army on account of his mental incapacity,[11] are not admissible to affect his credibility, as they are mere ex parte statements, and are not the best evidence. The same is true as to evidence of frequent illness and excitability, unless it is shown that such illness affected the present mental condition of the witness.[12] But, where the witness has been offered by the other side, it might be competent to show such facts on cross-exam-

5 People v. Enright, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913E, 318; Burns v. State, 145 Wis. 373, 128 N. W. 987, 140 Am. St. Rep. 1081.

6 Bell v. Rinner, 16 Ohio St. 45.

7 See supra, note 1.

8 Fairchild v. Bascomb, 35 Vt. 398; Coleman v. Com., 25 Grat. (Va.) 865, 18 Am. Rep. 711.

9 Territory v. Padilla, 8 N. M. 510, 46 P. 346.

10 Hicks v. State, 165 Ind. 440, 75 N. E. 641; Keely v. Moore, 196 U. S. 38, 25 S. Ct. 169, 49 L. Ed. 376.

11 State v. Spotted Hawk, 22 Mont. 33, 55 P. 1026.

12 Schoen v. Schoen, 48 Ill. App. 382.

ination. Inasmuch as great latitude is usually allowed on cross-examination in inquiring into the possible sanity of the witness, even to the extent of asking if the witness has not been an inmate of an asylum,[13] it has been held that the previous mental condition of a witness may be shown, as tending to establish the mental condition at the time of testifying, on the theory that insanity, once shown to exist, is presumed to continue.[14] But, under the requirements of that rule, this will not apply, where such previous insanity was merely temporary or transitory in its character. As dying declarations differ from ordinary testimony only in that they are not under oath, but their verity is vouched for by the fact that the declarant is conscious of his approaching end, and not likely to make a false statement which might endanger his happiness in a future life, it is logical that they should be subject to the usual rule with reference to the effect of insanity upon the admissibility or weight of such statement. The mental condition of the declarant would have the same effect upon the accuracy of such statement as it would on the testimony of any other witness. The mental condition therefore of a person making a dying declaration, may be shown as bearing upon the weight of his declaration,[15] and, where it can be shown that the declarant was wholly insane at the time the declaration was made, it should be rejected.

As corollary to the rule that an insane person is not a competent witness, it is held that evidence of the declarations of such a person is not admissible, where they are made during the existence of insanity, even though made by an injured person immediately following an injury. Since testimony of this character is ordinarily received only as corroborative of the testimony of such person, and the person's testimony is itself inadmissible because of his insanity, there would necessarily be no corrobora-

[13] Hendricks v. Mechanics' Bank (Sup.) 88 N. Y. S. 176.

[14] State v. Kelley, 57 N. H. 549.

[15] Com. v. Cooper, 5 Allen (Mass.) 495, 81 Am. Dec. 762; People v. White, 251 Ill. 67, 95 N. E. 1036.

tive evidence, because there would be no competent testimony to corroborate.[16]

§ 606. Competency of witness as affected by intoxication and drugs

For the same reason that a witness' sanity may be put in issue, it may be shown that a witness was intoxicated at the time of the trial or at the time of the transaction testified about; but in such case the evidence of intoxication goes to the credibility rather than to the admissibility of his evidence.[17] It is obvious that intoxication of a witness may affect both the accuracy of his memory and the accuracy of his observations, and the jury is entitled to knowledge of it in passing upon the weight to be given his testimony. But it is said that a mere showing that a witness is intoxicated, without showing something of the degree of intoxication, is too vague to be allowed to affect his credibility;[18] and such intoxication must be shown by testimony, or by acts and conduct of the alleged intoxicated witness, and not merely by evidence of the amount of whisky he may have drunk.[19] So it has been held that evidence of the fact that the witness' breath smelt strongly of whisky a few minutes after a transaction testified about would not, of itself, be sufficient evidence to go to the jury on the question of the witness' intoxication, as affecting the accuracy of his testimony.[20] On the other hand, it has been held, and we think with good reason, that evi-

16 State v. Meyers, 46 Neb. 152, 64 N. W. 697, 37 L. R. A. 423.

17 Meyers v. State, 37 Tex. Cr. R. 208, 39 S. W. 111; State v. Rollins, 113 N. C. 722, 18 S. E. 394; Joyce v. Parkhurst, 150 Mass. 243, 22 N. E. 899; State v. Castello, 62 Iowa, 404, 17 N. W. 605; State v. Sejours, 113 La. 676, 37 So. 599; Tuttle v. Russell, 2 Day (Conn.) 201, 2 Am. Dec. 89; Pittsburgh, C., C. & St. L. R. Co. v. O'Conner, 171 Ind. 686, 85 N. E. 969; Bliss v. Beck, 80 Neb. 290, 114 N. W. 162, 16 Ann. Cas. 366.

18 El Paso Electric R. Co. v. Lumbley, 56 Tex. Civ. App. 418, 120 S. W. 1050.

19 Tuttle v. Russell, 2 Day (Conn.) 201, 2 Am. Dec. 89.

20 Payton v. State, 60 Tex. Cr. R. 475, 132 S. W. 127.

dence of the drinking of a large quantity of whisky is a circumstance tending to establish intoxication, and is competent evidence to that extent.[21] We think the true rule is that where there is other evidence of intoxication of a degree likely to affect the mind of the witness, any evidence of drinking by him at or about the time of the trial, or of the transaction testified about, will be competent as corroborative evidence. Also, where the witness has testified that he was sober, and not drinking at the time of the transaction, it may be shown in rebuttal that about that time he habitually used intoxicants.[22] The fact that a witness is intoxicated, or was in that condition at the time of the transaction testified about, may be brought out on cross-examination, and great latitude is allowed in this respect.[23]

Practically the same rule which applies to the use of intoxicating liquors applies to evidence of the use of drugs by a witness. As bearing upon the witness' capacity to accurately observe and correctly remember a transaction, it may be shown that he was under the influence of drugs at the time of the transaction testified about, or is under the influence of the same at the time he is testifying.[24] But it has been held that the mere fact that a person is using, or has been using, drugs, is not sufficient, in the absence of a showing that his mind is affected thereby.[25]

[21] Fleming v. State, 5 Humph. (Tenn.) 564.

[22] Kuenster v. Woodhouse, 101 Wis. 216, 77 N. W. 165.

[23] Green v. State, 53 Tex. Cr. R. 490, 110 S. W. 920, 22 L. R. A. (N. S.) 706; Bliss v. Beck, 80 Neb. 290, 114 N. W. 162, 16 Ann. Cas. 366.

[24] State v. White, 10 Wash. 611, 39 P. 160, 41 P. 442.

[25] Williams v. United States, 6 Ind. Ter. 1, 88 S. W. 334; Botkin v. Cassady, 106 Iowa, 334, 76 N. W. 722; State v. Gleim, 17 Mont. 17, 41 P. 998, 31 L. R. A. 294, 52 Am. St. Rep. 655.

§ 607. Competency to make affidavits

Since the testimony under oath of an insane person cannot be received, it logically follows that such a person cannot make a sworn statement in the form of an affidavit. Such a solemn act would be vain, where the affiant did not understand or appreciate what he was doing, and the value of the facts contained in it would have little, if any, force. Where such an affiant has been adjudged insane and confined in an asylum, it has been held that such an affidavit so made by him will be void, unless the jurat of the officer taking the affidavit states that the affiant has been examined as to his sanity and found competent to make the affidavit.[26] In a like manner, such a witness cannot make certificates of proof and acknowledgments of written instruments.[27]

§ 608. Statutory rule

In a number of states, insane persons have been declared incompetent as witnesses by statutory enactment. The tendency of the courts has been to hold that such statutes are merely declaratory of the common law on the subject, and do not in fact change the rule that the class of persons referred to were those actually insane, and not merely those adjudged so;[28] that is to say, the fact that such a witness has been adjudged insane on inquisition is not conclusive of his incompetency, but it is a question of whether or not the witness is actually so insane at the time he is offered as a witness that he is not able to understand and appreciate the obligation of an oath, or to give a correct account of what he has seen and heard. However, in a few of the states, notably in Texas, the positive terms of such

[26] Spittle v. Walton, L. R. 11 Eq. 420, 40 L. J. Ch. (N. S.) 368, 24 L. T. (N. S.) 18, 19 Week. Rep. 405; In re Cross, 2 Ch. Sent. (N. Y.) 3; In re Christie, 5 Paige (N. Y.) 242.

[27] McKay v. Lasher, 121 N. Y. 477, 24 N. E. 711.

[28] Clements v. McGinn, 4 Cal. Unrep. Cas. 163, 33 P. 920; State v. Simes, 12 Idaho, 310, 85 P. 914, 9 Ann. Cas. 1216; Pittsburgh & W. R. Co. v. Thompson, 82 F. 721.

statute require a different rule; and in such case it is held that any person adjudged to be insane is incompetent as a witness;[29] and in Texas this is true, even where the witness understood the obligation of an oath and could give a lucid account of the transaction testified about. However, the Texas statute deals with criminal matters only, and the usual common-law rule will prevail in civil cases,[30] and even in criminal cases the courts of that state have refused to extend the effect of the statute, so as to include temporary insanity caused from drugs, etc.[31]

§ 609. Form of examination

Where the testimony of a mentally incompetent witness is held to be nevertheless admissible, the form and manner of his examination is very largely under the direction of the trial court; the aim and intention being to follow such a course of examination as will most likely elicit the information the witness may be able to give with reference to the matter on trial. It is therefore frequently proper to permit leading questions to be propounded to the witness, where his dullness of comprehension and weakness of memory renders him unable to otherwise comprehend the import of and make adequate replies to the questions asked him.[32] But care should be taken that such method of examining such witness is not abused, as weak-minded witnesses will often assent to and affirm facts suggested to them, regardless of their truth.

As has been seen supra,[33] a very wide range is allowed in the cross-examination of such a witness with reference to his pos-

[29] Lopez v. State, 30 Tex. App. 487, 17 S. W. 1058, 28 Am. St. Rep. 935; People v. Enright, 256 Ill. 221, 99 N. E. 936, 939, Ann. Cas. 1913E, 318; Lopez v. State, 30 Tex. App. 487, 17 S. W. 1058, 28 Am. St. Rep. 935.

[30] Wren v. Howland, 33 Tex. Civ. App. 87, 75 S. W. 894.

[31] Pones v. State, 43 Tex. Cr. R. 201, 63 S. W. 1021.

[32] State v. Simes, 12 Idaho, 310, 85 P. 914, 9 Ann. Cas. 1216; Armstead v. State, 22 Tex. App. 51, 2 S. W. 627; People v. Bernor, 115 Mich. 692, 74 N. W. 184; Selenak v. Selenak, 150 Ill. App. 399.

[33] See § 605.

sible mental condition; but such limits should be prescribed as will protect a weak-minded witness from undue rigor of questions tending to confuse rather than elicit information.

It is said that questioning of the witness in this connection must be confined to the time when he is on the stand and submitting himself to examination, and that such a witness cannot be forced to return to the stand for the sole purpose of being examined as to his mental condition;[34] but we question whether the action of the trial court in this connection will be reviewed, in the absence of a showing of abuse.

§ 610. Insanity witness—Grounds for admission of secondary evidence

Notwithstanding the incompetency of a person to testify himself, because of his insanity, it is frequently competent to prove facts connected with acts done by him. The best evidence—i. e., the testimony of the insane person himself—not being available, the ends of justice require that secondary evidence be admitted, to the end that some competent proof be had of such facts. For example, instruments written or signed by such incompetent persons, as wills, deeds, etc., or account books kept by such person, may be admitted in evidence, upon a showing of his incapacity and proof of his handwriting. Similarly, depositions or evidence given on a former trial, or at an examining trial or preliminary hearing, or even in another case, where the point at issue was the same, may be received in evidence, where the witness who gave such testimony has subsequently become insane.[35] This rule applies equally to civil and criminal cases,[36]

[34] Goodwin v. State, 114 Wis. 318, 90 N. W. 170.

[35] Wells v. Drayton, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718; Currie v. Child, 3 Camp. 283; Bernett v. Taylor, 9 Ves. Jr. 381; Kirchner v. Laughlin, 5 N. M. 365, 23 P. 175; Rothrook v. Gallaher, 91 Pa. 108; Marler v. State, 67 Ala. 55, 42 Am. Rep. 95; Lucas v. State, 96 Ala. 51, 11 So. 216.

[36] Howard v. Patrick, 38 Mich. 795; Berney v. Mitchell, 34 N. J. Law, 337; Stout v. Cook, 47 Ill. 530; Marler v. State, 67 Ala. 55, 42 Am. Rep. 95; Walkup v. Com., 20 S. W. 221, 14 Ky. Law Rep. 337.

and regardless of whether the witness is available, or even present in court, when his former evidence is offered.[37] But as such secondary evidence is, at best, but a makeshift, it must appear that there is no reasonable chance of securing better evidence, before it can be offered. Where it appears that the witness is not permanently insane, and is likely to recover after a reasonable interval, the secondary evidence will not be received, but the case should be postponed to await the recovery of the witness.[38] In this connection, it is held that the mental disturbance must amount to actual insanity, and mere loss of memory, etc., will not be sufficient as a predicate for the introduction of secondary evidence.[39] In such case the extent and degree of insanity is a question of law for the trial judge.[40]

§ 611. As affecting evidence of transaction with non compos

It is now generally held that, where one of the parties to a suit is incompetent to testify, the adverse party will not be allowed to testify to transactions had with such insane person. This rule is predicated on the one excluding evidence of transaction with a deceased person in any suit against the heirs and personal representatives of such deceased person, since the same reason for the rejection of such evidence exists in both cases, viz., the inability of such deceased or insane person to refute such evidence.[41] It is contended in such connection that to allow an adverse party to testify to such transactions, when he has

[37] Rothrock v. Gallaher, 91 Pa. 108. See, also, cases cited in § 610, note 35; State v. Wheat, 111 La. 860, 35 So. 955.

[38] Holbrook v. Gay, 6 Cush. (Mass.) 215; Reg. v. Marshall, Car. & M. 147.

[39] Wells v. Drayton, 1 Nott & McC. (S. C.) 409, 9 Am. Dec. 718; Stein v. Swensen, 46 Minn. 360, 49 N. W. 55, 24 Am. St. Rep. 234.

[40] Holbrook v. Gay, 6 Cush. (Mass.) 215.

[41] Bailey v. Harvey, 60 N. H. 152; Hamilton v. Starr (Tex. Civ. App.) 27 S. W. 587; People ex rel. Norton v. N. Y. Hospital, 3 Abb. N. C. (N. Y.) 229, note 2.

excluded from testifying, by objections to his testimony as incompetent, the only person who could likely refute the facts testified to, or contradict him in the matter, would open the door to possible fraud and great abuse, by inviting the unscrupulous to prey upon these unfortunates, by inventing spurious and pretended claims, which the non compos, because of his affliction, would be wholly unable to deny. It has been held that, where one of the parties to a suit is actually insane, admission of his testimony, even when it is done without the objection of the adverse party, will not render the testimony of the adverse party competent as to transactions with such insane party.[42] But it is further held that testimony of conversations and transactions with the alleged non compos, merely offered for the purpose of throwing light on his mental condition, will not be objectionable under this rule.[43]

But, to have the effect of excluding the testimony of the adverse party as to transactions with him, the insane party must be so insane as to render his testimony wholly inadmissible. And where he is merely partially insane, or mentally weak, but not wholy incompetent as a witness, that fact will not be sufficient to exclude the testimony of the opposite party testifying in his own favor.[44] However, it has been held that only a small showing is required to make out a prima facie case of insanity sufficient to exclude the evidence, if it is not rebutted by the opposite party to the suit.[45]

[42] Huling v. Huling, 32 Ill. App. 519.

[43] Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070, 1 A. L. R. 1514.

[44] Kendall v. May, 10 Allen (Mass.) 59; Doud v. Hall, 8 Allen (Mass.) 410.

[45] Abbott, Tri. Ev. p. 65; Little v. Little, 13 Gray (Mass.) 264.

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